

# AMERICAN FOREIGN RELATION CONDUCT AND POLICIES

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*REVISED AND ENLARGED EDITION*

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TO  
MY PARENTS



## PREFACE TO THE REVISED EDITION

The sweep of events has necessitated the revision of this book. During the decade that has elapsed since its previous publication, many significant developments in American foreign relations have taken place. Especially important among these has been the question regarding the possibility of maintaining American neutrality in the face of war and rumors of war in other parts of the world. Also prominent among recent issues of our foreign policy has been that of the application of the "good neighbor" policy to Latin America. Consequently, new chapters dealing with these developments have been inserted and many of the other chapters have been enlarged, rewritten, and brought up to date. In order more fully to orient the reader, the treatment of the topic of international relations in general in the introductory chapter has been considerably expanded.

An attempt has been made to balance the treatment between the two main divisions of the subject—conduct and policies—so as neither to overemphasize nor to neglect either aspect. The description of policies precedes that of organization and machinery. If, however, there should be any preference to take up these divisions in the reverse order, it will be found entirely feasible to do so.

In spite of the numerous changes that have been made, the main purpose of the book remains the same as in the preceding edition, *viz.*, to furnish a general survey of the formation and content of the principal American foreign policies that are of present interest and importance and to describe the machinery of government and the methods of procedure and practice as developed for the conduct of

American foreign relations. In its revised form, it is hoped that the book will more fully attain its purpose and that it will more adequately serve not only as a textbook for university and college students but also as furnishing for the general reader a background for the better understanding of current events in the field of American foreign relations.

J. M. M.

## PREFACE TO FIRST EDITION

Despite its growing importance as a world power, the United States was still, at the outbreak of the Great War, largely self-centered and provincial. Speaking broadly, this condition no longer exists; notwithstanding a certain reaction against world policies, people are more interested to-day than ever before in all that concerns our foreign relations. It is being increasingly brought home to Americans of every geographical section and of every shade of opinion that national decisions on matters of foreign policy are in many instances fraught with the most vital consequences in their effects upon the national welfare. No intelligent citizen can afford to be ill-informed regarding our foreign policies and the basic considerations upon which they rest. It is hoped that this volume will be of assistance in stimulating and guiding further interest in this momentous phase of our national life.

Most of the books hitherto published dealing with the foreign affairs of the country have treated the subject historically, and have, therefore, placed the emphasis on events, often presented in chronological sequence. The aim in the present work has been, rather, to discuss the subject from the point of view of political science. Hence the treatment is topical rather than chronological; diplomatic events as such are introduced only incidentally to illustrate the principles and problems considered.

The present work is the outgrowth of a book which was published in 1922 under the title, *The Conduct of American Foreign Relations*. With certain changes necessary to bring it up to date, the material in that book has been incorporated as Part II of the present volume. To Part II there

have also been added three new chapters: XI, XIV, and XV. Part I, which is entirely new, is intended to furnish a general survey of the formation and content of the principal American foreign policies that are of present interest and importance. In Part II emphasis is placed upon the organization of the government for the conduct of foreign relations, the control exerted by its various branches therein, and the methods of procedure followed. In both parts particular attention is given to the important developments of the past few years, which have thrown much new light upon different phases of our foreign relations. A number of appendices have been added containing pertinent documents or amplifying discussions of topics treated in the text. It is hoped that these changes and additions will render the book still more useful to students, teachers, and publicists who have found it serviceable in the past.

I have taken the liberty of drawing upon certain of my articles, published in recent years in the *Michigan Law Review*, the *American Year Book*, and the *American Political Science Review*, for which acknowledgment is made.

For helpful criticisms and suggestions, I am deeply grateful to Professors J. W. Garner of the University of Illinois, W. W. Willoughby of the Johns Hopkins University, C. C. Tansill of the American University, P. B. Potter of the University of Wisconsin, and especially to Professor F. A. Ogg, the editor of the series in which the volume appears. For the book's imperfections, however, I am, of course, alone responsible.

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**PART I**  
**POLICIES**



# AMERICAN FOREIGN RELATIONS

## CONDUCT AND POLICIES

### CHAPTER I

#### INTERNATIONAL RELATIONS<sup>1</sup>

THE student who examines the political life of the world today is immediately impressed by two broad, fundamental conditions: (1) the existence of about seventy distinct states or nations,<sup>2</sup> and (2) the existence of increasingly important and multifarious relations between them. These conditions must be recognized by everyone, without regard to whether his point of view is that of a narrow nationalist or that of an extreme internationalist.

#### THE CHARACTERISTICS OF STATES

From the standpoint of political science, the states that are regarded as members of the family of nations have certain characteristics which distinguish them from other governmental units. These are population, territory, government, and sovereignty or independence. It is not necessary, however, that every member of the family of nations should be fully sovereign or independent in every respect. It is merely necessary that each such member should be regarded by some or all of the other members

<sup>1</sup>Space permits only a brief treatment of this topic here. For further information, consult the references at the end of the chapter.

<sup>2</sup>Although the term "nation" emphasizes the ethnic aspect while the term "state" emphasizes the political aspect, these terms will here be used indiscriminately.

as capable of conducting foreign relations. For example, Canada, Australia, and other parts of the British Empire owe at least nominal allegiance to the British Crown, but for all practical purposes are autonomous states in the management of their foreign relations.

The number of states regarded as members of the family of nations may change from time to time. Thus, Ethiopia, formerly independent, has been conquered and absorbed by Italy. On the other hand, the Philippine Islands, a dependency of the United States, may in time obtain independence.

As in the case of other groups or societies, the members of the family of nations have certain similarities with each other, and we also find certain differences between them. The similarities are fundamental, because without them the family or society of nations could not exist. These similarities consist not only in the distinguishing characteristics of states mentioned above, but also in the recognition of common principles such as the rules of international law which regulate the rights and duties of nations. Without such recognition, the necessary homogeneity upon which the society of nations is based would be lacking.

The differences between nations, although more superficial than the similarities, are more striking. Among these differences are the extent of area and population, location of territory, character of government and law, financial and economic strength, and power generally in international relations. Differences in natural resources and in the technical skill of the population naturally have an influence upon economic strength. Such resources, combined with favorable geographical location and climatic conditions, may give some states the position of creditor, and possibly exploiting, nations, while others, whose "territory does not lie within the main field of modern enterprise and action,"<sup>1</sup> are debtor and possibly exploited

<sup>1</sup> Woodrow Wilson's phrase.



nations. The independent nations of the world are unequally distributed among the continents. In proportion to area, there are more in Europe than on any other continent, while there are fewer in North America. All the great powers of the world, however, are located in the North temperate zone, and this is undoubtedly no accident. On account of the above-mentioned elements of difference between states, as well as differences in history, tradition and general world attitude, differences in their international policies are brought about.

Although the large majority of nations are comparatively weak in world affairs, a few have emerged as world powers. There is fairly general agreement that in the list of world powers should be included the United States, Great Britain, France, Germany, Italy, Russia, and Japan. In their influence and interest in affairs outside their own boundaries, or in the general concerns of mankind, these nations take priority over the others. Changes in this list are liable to take place from time to time. Spain would formerly have been included, but has now dropped to the rank of a second-rate power. The exact date when the United States emerged as a world power is a subject of difference of opinion, but it probably occurred at the time of the Spanish-American War. However, from the time when we extended our territory across the continent, we acquired the potentiality or destiny of becoming a world power. It may be noted, in passing, that the primacy of the great powers is recognized to some extent in the organization of the League of Nations, through the device of limited membership in the Council.

Most of the world powers are imperialistic in fact, or at least in tendency. Imperialism has been defined as an "indefinite prolongation of sovereignty." The nations imbued with it either have held, now hold, or hope to hold colonial dependencies. The motives which lead nations on the imperialistic path are various. They include the need,

or supposed need, for additional territory for settlement by congested home population, for markets for home products, for raw materials, for strategic advantage in military, naval, or aerial operations, or for mere national prestige. As to whether the possession of colonies is economically a help or a burden to the mother country, there is a difference of opinion. At any rate, few besides the world powers can afford to follow the imperialistic path.

#### INTERNATIONAL INTERCOURSE

The relations between nations may be classified into those between sovereign governments and those between people of different nations. The latter may, for purposes of distinction, be called international intercourse. It is a common saying that the modern world has, in a sense, grown smaller on account of the greatly increased facilities for rapid transportation and communication. Ships now cross the Atlantic in about four days whereas it required months a century ago. They transport thousands of sacks of mail and thousands of tons of freight, as well as passengers. Regular air-ship services have been established across both the great oceans. International communication is facilitated by modern inventions, such as the trans-oceanic cable, wireless telegraph and telephone. Thus, the transmission of information or intelligence between nations may be instantaneous. Every American school-boy knows that the Battle of New Orleans was fought in 1815 after the conclusion of the treaty ending the war, an event which could hardly occur in the present day of rapid communication. Important happenings in one quarter of the globe are now instantly known in every other. Metropolitan newspapers publish daily dispatches detailing important developments in the countries of the world generally. These facilities for international communication tend to promote a cosmopolitanism among the intelligentsia of the

civilized nations. The international interchange of ideas creates a world culture. Art, science, finance, even athletics, become international in scope and outlook. Religion is also both international and supernational in outlook. It embraces humanity, rather than mere race or nationality. Its ideal is the brotherhood of man.

#### THE MOVEMENT OF POPULATION

Under the feudal system during the Middle Ages, man was attached to the soil. In normal times the ordinary man seldom travelled during a lifetime as far as twenty-five miles from the place where he was born. With the opening up of the Modern Age, and especially in the last century, this has all been changed. Instead of being stationary, population has attained great mobility. Americans are known as great travellers and are at all times found in every quarter of the globe. Several hundred thousand American tourists annually visit Europe. On the other hand, aliens of practically every nationality are found within the borders of the United States. Individuals who travel from one country to another may be classified into two groups. In the first group are travellers who make temporary visits to another country for business or pleasure. The second group consists of immigrants who go from one country to another in order to establish permanent homes.

In recent years there has been a great increase in the interchange of students and lecturers between the nations. Many American students attend European universities, while a large number of Oriental students are found at American universities. American university audiences frequently have the privilege of hearing lectures by distinguished European professors and recently there has been established in New York City what is known as the

“University in Exile,” the faculty of which is composed largely of former professors in German universities.

#### IMMIGRATION

The large-scale movement of population from one country to another consists mainly of immigrants who go to establish permanent homes. During the nineteenth century, economic and political conditions in Europe caused large numbers of people to desire to better their condition by emigrating to the New World. The resulting immigration was probably the greatest phenomenon of the sort that has occurred in the history of the world. Most of the European immigrants came to the United States. Until about 1880 immigration to the United States was welcomed and caused no problem in the way of assimilation, because it was drawn mainly from the British Isles and northern Europe. During the thirty years prior to the outbreak of the World War, however, the stream of immigration to the United States came predominantly from the countries of southern and southeastern Europe. America became known as the melting-pot of the world, with a more heterogeneous population than any other country. One effect of the World War on the United States was to show that the melting-pot was not doing its work satisfactorily. Huge foreign colonies of various nationalities were found in most of our large cities with which the process of assimilation had apparently made little headway. Consequently, Congress has enacted restrictive immigration laws which have materially reduced the number of immigrants annually arriving in the United States. Oriental exclusion, which had in 1882 been applied to the Chinese, was extended by Congress in 1924 to the Japanese. It is obvious that the traditional view that America is a haven of refuge for the people of all nations has been definitely discarded.

As far as immigration to the United States is concerned,

the countries of the world are divided into three groups: (1) Europe, (2) the Orient, and (3) the states of the Western Hemisphere. Under the Congressional Act of 1924, European immigrants are placed on the quota system, there being annually admitted from each country only two per cent of those of the same nationality who were in the United States in 1890. Oriental immigrants, as indicated above, are definitely excluded. No special restrictions are placed on immigrants from the states of the Western Hemisphere. But to such immigrants are applicable the general restrictions, such as those excluding criminals, paupers, contract laborers, and persons suffering from contagious diseases.

Immigration to the United States has had important effects upon the international relations of, and political conditions within, this country, as is evidenced by the following examples.

During the first half of the nineteenth century when the tide of immigration to the United States was at its height, the nations of Europe did not generally recognize the right of expatriation. That is to say, they did not admit that their subjects could throw off their allegiance to their native country by going to a foreign country and becoming naturalized citizens. This idea was embodied in the slogan, "Once a British subject, always a British subject." The motive behind this idea was probably that of being able to call such subjects, regardless of where they might be located, into military or naval service.

On the other hand, it was natural that the United States should insist on the right of naturalization, because, being a new country with extensive, thinly-populated territory and undeveloped resources, it was necessary for her to attract immigrants from other countries, and this could not safely be done in large numbers unless the immigrants could renounce their former allegiances and become naturalized American citizens.

Thus, while the interest of a nation naturally follows its citizens into foreign parts, and endeavors to extend to them protection in the exercise of their legitimate rights, international differences may arise as to what these rights are. Moreover, the attempt of the nation to exercise control over its citizens in foreign countries may bring about conflict between the governments of the two countries concerned. The War of 1812 between the United States and Great Britain was caused in part by a difference of opinion between the two countries as to the allegiance of former British subjects who had become naturalized American citizens. Great Britain at that time denied the right of her subjects to renounce their British allegiance. Consequently, she exercised what she regarded as her right to impress them into her service when found as sailors on American vessels, in spite of their American naturalization. The United States, however, insisted on the right of naturalization, and after several decades Great Britain finally admitted the right.

European countries generally have now come around to the American point of view, so that the right of expatriation has been embodied in the practices of nations and recognized by international law. This is one example, of which others might be mentioned, where what was at first a mere policy of the United States came subsequently to be incorporated into international law. This was due to the fact that the policy of the United States, while based on her special interests, nevertheless embodied an internationalist, rather than a narrow nationalist, point of view.<sup>1</sup>

#### RACIAL FACTORS

The large number of persons of alien extraction and sympathies already in the United States increases the

<sup>1</sup> Cf. P. B. Potter, "Nature of American Foreign Policy," *Am. Jour. of Int. Law*, XXI, 53-78 (Jan., 1927).

difficulty of managing our foreign relations. National and racial antipathies generated in Europe are transplanted to our soil. Since most of the persons concerned are voters, politicians are naturally sensitive to their views. The Government, which is in the hands of the politicians, often feels unable to take a positive stand in foreign affairs where the interests of different foreign nations conflict. The result is that the foreign policy of the Government under these circumstances is likely to be feeble, timid, and vacillating. Former Secretary of State John Hay, in a letter dated June 23, 1900, feelingly described this situation as follows:

“There is such a mad-dog hatred of England prevalent among newspapers and politicians that anything we should now do in China to take care of our imperiled interests, would be set down to ‘subservience to Great Britain.’ . . . Every morning I receive letters cursing me for doing nothing, and others cursing me for being ‘the tool of England against our good friend Russia.’ All I have ever done with England is to have wrung great concessions out of her with no compensation. And yet these idiots say I’m not an American because I don’t say, ‘To hell with the Queen,’ at every breath. . . . Every Senator I see says, ‘For God’s sake, don’t let it appear we have any understanding with England.’ How can I make bricks without straw? That we should be compelled to refuse the assistance of the greatest power in the world, in carrying out our own policy, because all Irishmen are Democrats and some Germans are fools—is enough to drive a man mad. Yet we shall do what we can.”<sup>1</sup>

On the other hand, a desire on the part of the party in power to curry favor with some racial class may cause the adoption of resolutions expressing sympathy with oppressed minorities in foreign countries, which the government of those countries may justly regard as an act of

<sup>1</sup> W. R. Thayer, *Life and Letters of John Hay* (New York, 1915), I, 234-5.

interference in their internal affairs. To say the least, such resolutions are in poor taste and would probably be resented by our Government if directed against our treatment of our own dependent peoples.

#### INTERNATIONAL TRADE

An important phase of international intercourse consists in the interchange of goods between different countries. In certain countries at various times, international trade had been a governmental monopoly, but normally, or at least ordinarily it is in the hands of individuals and corporations or business concerns organized for profit.

It is axiomatic that the economic welfare of a nation depends to a large extent upon the state of its international trade. The extent to which this is true varies, of course, in the case of different nations. Since nations differ in conditions of climate and soil suitable for agriculture, in the distribution of minerals and raw materials, in the efficiency of labor, and in the amount of capital necessary for the development of natural resources and for the manufacture of multifarious finished products, and in other respects, it follows that hardly any nation is entirely self-sufficient in the economic sense. It must, therefore, engage in the importation of the goods which it lacks and cannot economically produce, and in the sale and exportation of its surplus products. Under certain circumstances, it may need to import or export labor or capital. Thus Japan, having a large surplus population, needs to find an outlet for her emigrants. But these surplus Japanese cannot, without causing economic embarrassment, go to other countries except those where there is a scarcity of labor. On the other hand, Mexico has a scarcity of capital and must import it from abroad in order to develop her natural resources.

Even when not a government monopoly, international



trade is, of course, subject to governmental regulation. The nature and extent of such regulation has varied at different times. During the seventeenth and eighteenth centuries the mercantile system prevailed, which was based on the idea of economic nationalism. International trade was conceived to be for the benefit of the state rather than for the individual. The system expressed itself in "harsh navigation laws, high tariffs, prohibitions, trade restrictions, and commercial war."<sup>1</sup>

At the end of the eighteenth century came a revolution on both the economic and political sides. In its economic aspect, it was based on mechanical inventions which brought about the concentration of laborers in factories. The factory system greatly increased production and there was a corresponding increase in trade and in the need for raw materials and new markets. Capitalists who owned the factories became restive under governmental regulation and the doctrine of laissez faire or free trade developed in industrial matters at the same time that the doctrine of individual freedom developed as the result of the political revolution.

In the last quarter of the nineteenth century a renewed struggle for colonies and spheres of influence in Africa and Asia developed among the principal European powers. This movement would probably have extended to South America also if it had not been for the deterring effect of the Monroe Doctrine. After the World War, this movement in a more refined form was continued through the adoption of the mandate system, which has been characterized as a "decent disguise for annexation." The increased need for raw materials to be transformed into finished products as well as the need for more extensive markets for the disposal of surplus home products no doubt furnished, in part at least, the motive power for this movement. It was accompanied in most countries by a

<sup>1</sup> W. S. Culbertson, *International Economic Policies* (1925), p. 2.

reaction away from laissez faire towards governmental restrictions of trade, manifested in high tariff rates and imperial preference.

The surplus profits piled up by capitalists through manufacturing industries were in part invested not only in the exploitation of colonies and spheres of influence but also of other backward countries. Such investments sometimes took the form of the establishment of subsidiary concerns for the supply of raw materials and sometimes the form of loans to the governments of backward countries. A high rate of interest on such loans was exacted on account of the greater risk involved and then such risk was largely overcome through the protection afforded by the governments of such capitalists in order to prevent defaults and to compel repayment of the debts.

Economic nationalism as manifested in the struggle among powerful nations for markets, raw materials, and investment opportunities is a form of international war and may lead to a war of force. For example, the Boer War was probably due largely to the struggle between the British and the Boers for control over the gold of the Transvaal. The penetration of Japan into Manchuria and other parts of China is similarly due in part to the former's desire for minerals, timber, and other raw materials found in that region.

After a war the cessation of hostilities does not necessarily bring about a cessation of economic warfare. In fact, the tendency towards economic nationalism is likely to continue or even to be accentuated. Each nation strives to maintain a so-called "favorable balance" of trade,<sup>1</sup> but, in order to accomplish this purpose, increased governmental regulations and restrictions are deemed necessary. New industries which sprang up during the war need protection in order to survive. The depression and the

<sup>1</sup> The term "favorable balance" of trade is a misnomer. If we include both visible and invisible items, the international trade of each country must be evenly balanced, or in a state of equilibrium.

various economic dislocations which naturally follow war seem to require energetic governmental action in order to be overcome or remedied. Such action tending toward economic self-sufficiency is likely to be demanded by public opinion, which is still under the influence of the war psychology. If democratic governments do not seem to be energetic enough for the purpose, they may be overthrown and dictatorships established in their places. These dictatorships set up a totalitarian state for the more efficient conduct of the economic warfare. This, in turn, is likely to lead to war, and thus a vicious circle is established.

#### THE UNITED STATES AND INTERNATIONAL TRADE

The United States has not been able altogether to escape the prevalent virus of economic nationalism. During and after the World War, American foreign trade greatly increased. New industries developed which, after the cessation of hostilities, were unable to meet foreign competition without governmental protection. For this and other reasons, acts were passed by Congress in 1921 and 1922 raising our tariff duties. Finally, by the Smoot-Hawley Act of 1930 they were raised to still dizzy heights. Thus, although the United States continued to insist on the maintenance of the open door in the Far East, we maintained practically a closed door at home. The passage of the Smoot-Hawley Act struck a body blow at American foreign trade and caused widespread retaliation against us by many nations.<sup>1</sup> For several years after the passage of the Act, the value of our imports declined tremendously. Our exports also declined, but still remained larger than our imports.<sup>2</sup> We thus maintained a so-called "favorable balance" of trade, in spite of the fact that we were no longer a debtor, but a creditor nation.

<sup>1</sup> J. M. Jones, *Tariff Retaliation Repercussions of the Hawley-Smoot Bill*. (Philadelphia, 1934).

<sup>2</sup> The volume of goods, however, did not decline as much as the money value.

Although never entirely self-sufficient economically, the United States has during most of its history been more nearly so than many of the European countries. On account of the large extent of its territory and population, most of the necessities of life can be produced within its borders and its home market is generally sufficient to absorb the larger share of its products. Its international trade has been estimated at not more than ten per cent of its domestic trade.<sup>1</sup>

During the World War our productive facilities, both in agriculture and in manufacture, were expanded in order to meet the new foreign demand. Since then, inasmuch as our industry was geared to this increased demand, our economic welfare has been more dependent upon the state of our international trade. When, after the Armistice of 1918, foreign demand for our products, mainly agricultural, appeared about to decline, with resulting price deflation in the United States, we loaned European nations the money with which to continue their purchases. These loans, as well as the war loans proper, were subsequently defaulted.

In view of our disastrous experience in attempting to maintain an over-stimulated foreign trade, a reaction has set in which expresses itself in the demand for almost complete economic self-sufficiency or self-containment. Newspaper campaigns are conducted the slogan of which is "Buy American," just as the people of other countries are urged to "Buy British," et cetera. Some of the American newspapers engaged in this campaign import large quantities of wood-pulp from Canada. Such newspapers do not suggest that we should sell less abroad, and apparently harbor the illusion that we can continue to sell abroad without buying. If an individual or a family should produce all the goods that he or it consumes, the result would

<sup>1</sup>In the case of some products, however, such as cotton, much more than 10 per cent is exported.

be economic self-sufficiency, but the adoption of such a plan would hardly be suggested in this modern age. The truth is that, just as trade between individuals redounds to the economic advantage of each, so international trade contributes to the economic betterment of the nations concerned. Moreover, as has been pointed out, international trade is a two-way street. There must be both buying and selling.

Such trade is based on the principles of specialization and division of labor. The United States specializes in the manufacture of automobiles by mass production methods and can produce better and cheaper cars than foreign manufacturers can. If foreign governments place such high import duties on American automobiles as to prevent their introduction, the result is that car buyers in those countries must pay dearly for inferior cars and are deprived of the economic benefit of obtaining the better and cheaper American product. The same principle, of course, works the other way around when the United States, by high tariff duties, prevents the importation of articles which can be produced better and more cheaply in foreign countries.

That the United States needed to export its surplus products was recognized from the first and found support in the constitutional prohibition against the levying by Congress of export taxes. After the World War our export trade declined as a result of economic nationalism in foreign countries as manifested in high tariffs, import quotas, and other restrictive devices. Since we could not dispose of our surplus agricultural products abroad, our Government adopted the policy of encouraging the reduction of acreage in cultivation by paying farmers for reducing their crops. This could hardly be regarded as more than a temporary policy to meet an emergency. The efforts of our Government must eventually be directed towards lowering the barriers which place restrictions on our export trade.

It is equally necessary that the Government should exert itself not only to maintain but to increase our import trade. Extreme nationalists who advocate the complete elimination of imports overlook certain important considerations. It is impracticable for the United States to eliminate import trade for three reasons. In the first place, there are certain essential products used in large quantities in the United States which either cannot be produced here at all or cannot be advantageously produced. Among the more important of these may be mentioned coffee, tea, silk, rubber, and tin.

In the second place, since, as pointed out above, international trade is a two-way street, it is necessary for the United States not only to maintain but to increase its import trade in order that foreign nations may be able to buy from us and we may thus be able to dispose of our surplus products. If we refuse to buy from foreign nations, we will not be able to sell to them because they will not have the money with which to pay for their purchases, unless we lend it to them. If we thus cut off our export trade an enormous amount of misery and economic dislocation will be produced in this country. Millions of acres will have to be withdrawn from cultivation, many manufacturing plants will have to be left idle, and the people who now derive their support from such cultivation or from such plants will be reduced to the most serious straits.

The third reason why the United States needs to increase its import trade is that we are a creditor nation and, in the long run, the only way in which our debtors can repay their debts is by selling to us more than they buy from us. A creditor nation, therefore, should have a so-called unfavorable balance of trade in order to protect its foreign investments. These facts may be obscured for a time by certain factors, such as expenditures by American tourists abroad, immigrant remittances to the old countries, the

shipment of gold to the United States and the practice of continuing to lend to our debtors the money with which to pay their debts. It was by these devices that the United States was able to maintain a large export trade up to 1929 in spite of our high tariff on imports. After the beginning of the depression in that year, foreign loans were cut off almost entirely and tourist expenditures and immigrant remittances were greatly reduced. The result was that foreign nations not only defaulted on their loans but also reduced very greatly the amount of their purchases from us.

Early in the Franklin Roosevelt Administration, the currency was depreciated and the dollar was devalued to 59 cents. With reference to articles of international commerce, this step had the effect, at least temporarily, of stimulating our export trade to countries which had not devalued their currencies to an equal extent. On the other hand, it discouraged our import trade in the same way as if our tariff rates had been correspondingly raised. However justifiable, therefore, this move may have been from the standpoint of our domestic situation, it had an unfortunate effect upon our international trade position. Stabilization of world currencies would undoubtedly assist materially in the recovery of international trade.

#### RECIPROCAL TRADE AGREEMENTS

In view of the foregoing discussion, it might be supposed that the situation with reference to our international trade might be greatly improved by an immediate, drastic, and comprehensive reduction of the tariff rates. Inasmuch, however, as American industry had become so accustomed and adjusted to high tariff rates that they had come to be regarded as one of the static factors in the situation, any such sudden and drastic reduction of the rates would be bound to produce much unsettlement and might have the

effect of throwing out of employment many persons to be added to the existing millions of unemployed. Any change in the situation with reference to our tariff rates should be worked out carefully so as to cause as little dislocation as possible to American industry and should be based on international agreement so that, in exchange for a lowering of our rates upon foreign products, corresponding concessions may be obtained from foreign countries for the admission of American products. From a broad point of view, it seems hardly justifiable economically for the United States to produce wines for domestic consumption when better and cheaper wines can be secured from France. On the other hand, the United States has an equal advantage over France in the production of apples. The obvious thing to do, therefore, is to lower the duties on French wines coming into the United States in return for a corresponding reduction by France of the duties on American apples.

This was the policy pursued by the Franklin Roosevelt Administration, as embodied in an act of Congress passed in 1934 and in a considerable number of reciprocal trade agreements negotiated by Secretary of State Hull on behalf of the President and under the authority of that act.<sup>1</sup> The purpose of the act, which was to remain in force for three years, was stated to be that "of expanding foreign markets for the products of the United States." The President is authorized to modify existing rates of duty by not more than fifty per cent. The agreements negotiated under the act go into effect without further action by Congress or by the Senate.

The trade agreements act embodies the traditional American principle of the most favored nation in the provision that "the proclaimed duties . . . shall apply to articles the growth, produce, or manufacture of all foreign

<sup>1</sup> The Trade Agreements Act, known as an act to amend the tariff act of 1930, and passed by Congress June 12, 1934, is reprinted in the appendix to F. B. Sayre, *America Must Act*. (1936).



countries, whether imported directly or indirectly." In accordance with this principle, each party agrees to accord to the other the same commercial treatment as that accorded to the most favored nation. Such treatment, however, must be on a *quid pro quo* basis, and is not accorded to nations which discriminate against our trade. The act, therefore, contains a proviso that the "President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce."

The negotiation of trade agreements under the act has been followed by a considerable increase of American international trade, although nothing very extensive in this direction is likely to be accomplished without stabilization of currencies and exchange rates. The act is, however, a step in the right direction, because it is based on the sound principle of the essential unity of international economic life. The economic prosperity of each nation is to a considerable extent bound up in that of the others. This truth is being gradually but forcefully thrust in upon the consciousness of those nations which have adopted the policy of extreme economic nationalism.

#### THE UNITED STATES AND FOREIGN INDEBTEDNESS

The above discussion of international trade may help in understanding the situation of the United States with respect to international indebtedness. Prior to the World War the United States was a debtor nation. During and since that conflict, however, American loans to foreign, principally European, countries have transformed this situation to such an extent that the United States became the greatest creditor nation in the world. Such loans were partly private loans to foreign governments and industrial corporations. From the standpoint of American foreign relations, however, the most important loans were the so-

called allied war loans, amounting to over ten billions of dollars, made by our government to Great Britain, France, Italy, Belgium, and a few other countries. Although there existed in the minds of many Americans after the War an intention of keeping out of Europe in the future, the existence of these various loans was one factor which tied us to Europe in the sense that we had a huge stake in the solvency and economic progress of European nations.

It is desirable to understand at the outset the method whereby the allied war debts were incurred. Immediately upon the entrance of the United States into the war in 1917, the allied powers sent representatives to the United States who bought large quantities of supplies, such as munitions, foodstuffs, and cotton, to be shipped to the allied countries. The private individuals and corporations who furnished these supplies were paid for them by the United States Government out of the proceeds of taxes and Liberty loans. The Government in its turn took from the allied powers their notes of indebtedness. During the excitement of war, little thought was given to the method of repayment.

Even after the armistice of November 11, 1918, the United States continued the same process of selling supplies to the allied powers on credit. About three billion dollars out of the ten billions were post-armistice loans. These were made not to help win the war, but to aid in the domestic reconstruction of the war-ridden countries, where normal peace conditions could naturally not be restored at once. These post-armistice loans were also made in order to prevent a debacle in the American markets which might be caused by the collapse of prices if the European demand for the large surplus of American supplies were suddenly withdrawn.<sup>1</sup>

In 1922 Congress created the World War Foreign Debt Commission with authority, not to cancel any of the debts,

<sup>1</sup> "Intergovernmental Debts," *International Conciliation*, No. 287, February, 1933, p. 13.

but to enter into funding agreements with the debtor governments. At about the same time the State Department adopted the policy of indicating to American bankers underwriting private loans to foreign governments or corporations whether or not such loans were objectionable from the standpoint of any national interest involved, without, of course, passing upon the merits of the loans from a business standpoint. By this means, the Department was able to put pressure upon certain foreign governments to induce them to enter into agreements for the funding of the debts, for such governments found themselves unable to borrow money in the United States—the only then available money market—in the face of objections from the State Department.

The funding agreements with the various debtor nations were entered into during the period from 1923 to 1930. They provided for the repayment of the loans over a period of sixty-two years. These payments were to include not only the principal, together with interest to the date of the agreement, but also interest over the sixty-two year period. The original notes of indebtedness held by the United States Treasury called for interest at five per cent. In the agreements, however, this rate of interest was reduced to amounts varying from three and three-tenths per cent in the case of Great Britain to four-tenths of one per cent in the case of Italy. These varying amounts of interest were fixed in accordance with the World War Foreign Debt Commission's estimate of the debtor's capacity to pay over the sixty-two year period. In estimating this capacity to pay, the Commission took into account the amount of reparations which the debtor was due to receive from Germany, as well as other factors. None the less, the estimate was obviously more or less guesswork.

In view of the lower rate of interest in the funding agreements as compared with the rate specified in the original obligations, it is obvious that a certain amount of

the indebtedness was cancelled. Therefore the result of adding interest to principal was to increase the total indebtedness to over twenty-two billions of dollars, or twice the amount of the principal. The propriety of adding any interest may be questioned. Ordinarily, by interest is meant money paid for the use of money and is proper in commercial transactions. The war debts, however, were not ordinary commercial transactions. Moreover, as we have seen, the loans were not in the form of money but of goods.

After the debt agreements had been entered into, the official position of our Government was that the whole matter was a closed chapter except that the United States was to receive the stipulated payments over the sixty-two year period. In spite of the fact that the American Commission had taken German reparations into account in estimating the capacity of our debtors to pay, the official position of the United States Government was that there was no necessary connection between reparations and the debts owed to the United States.

Reparations were not based on voluntary contract, as our loans were, but were enforced contributions which the victorious allies imposed upon defeated Germany. Although the United States helped materially to defeat Germany, we not only made no demand for reparations but considered it against our principles to do so.<sup>1</sup> We therefore refused to admit officially any direct connection between debts and reparations, as such admission would have implied that the United States was the ultimate collector of reparations. Nevertheless, although from the legal point of view there was no connection between debts and reparations, there was undoubtedly a close economic connection between them.

The treaty of Versailles had left the amount of German

<sup>1</sup> We did, however, maintain claims against Germany to cover the cost of the army of occupation.

reparations undetermined. Although the United States was not officially concerned in fixing their amount, it participated unofficially through its citizens, Charles G. Dawes and Owen D. Young, who were chairmen of international committees of experts which worked out plans providing for the amounts of Germany's reparation annuities and also the means whereby she might be able to meet them. A noteworthy feature of the Young plan was that it provided for a loan to Germany, a large part of which was floated in the United States. Such plans were intended to place the problem of German reparations on a more stable basis, but both proved to be merely temporary.

The world-wide economic depression upset the operation of these plans. It brought with it a world-wide fall in prices, involving an increase in the purchasing power of money with the result that a debtor who was bound to repay a fixed sum was really paying considerably more in actual purchasing power. This situation naturally increased the burden upon Germany in the payment of reparations. Moreover, upon the payment of reparations the allied powers largely depended for the payment of their debts to the United States. Germany was able to keep up the payment of reparations as long as she was able to borrow from abroad, mainly in the United States. Thus, in ultimate analysis, the debts owed by the allied nations to the United States were being largely paid by American investors through German loans floated in this country. With the coming of the acute phase of the economic depression, however, the floating of German loans in the United States was no longer feasible, and the situation with reference to the payment of debts and reparations rapidly reached a crisis.

Economic forces and the logic of events gradually undermined the positions of the United States Government that the question of war debts was closed by the funding agreements and that there was no connection between debts and

reparations. In the face of a crisis that endangered the payment of intergovernmental debts and reparations as well as the payment of debts owed by the German Government to private American investors, President Hoover in 1931 issued his celebrated moratorium statement proposing the postponement for one year of all payments on intergovernmental debts and reparations. Although he took occasion to declare that the repayment of the debts due us was not contingent upon German reparations or related thereto and that he did not in any remote sense approve of the cancellation of the debts due us, nevertheless the initiative which the President assumed in suggesting and securing the adoption of the moratorium virtually recognized the connection between debts and reparations and seemed to foreshadow the ultimate revision of the war-debt settlements. In ratifying the Hoover moratorium, however, Congress attached a resolution declaring against cancellation or reduction of the debts.

At the Lausanne conference of 1932, attended by Germany and the nations to which she owed reparations, an agreement was reached upon a treaty which very materially reduced the amount of German reparations. Ratification of this treaty, however, was made contingent upon reduction of the war debts owing to the United States. If this was an attempt on the part of European debtor nations to force the hand of the United States, it failed. At the World Economic Conference which met in London in 1933, the United States refused to allow the question of the debts to be placed upon the agenda. This attitude, together with devaluation of currencies by the United States and other nations, rendered the conference largely futile.

After the end of the Hoover year of postponement, some of the debtor nations failed to resume their debt installments. Others resumed payments, but later reduced them to a small fraction of the amount due. These "token" payments were intended merely to avoid total default. In

1934 Congress passed the Johnson Act prohibiting the floating of loans in the United States by foreign governments that were in default in the payment of their debts to us. Under this act the Attorney-General ruled that governments making merely "token" payments to the United States would be considered to be in default. Thereafter, with the exception of Finland (whose debt was so small as to be negligible), even token payments by European debtor nations were suspended.

The question as to the wisdom or folly of the debt settlements has aroused great differences of opinion among the people of the United States. The "man in the street" is likely to adopt the view attributed to former President Coolidge who seemed to think that the last word on the question had been said when he remarked, "Well, they hired the money, didn't they?" About 1925, however, a movement for the revision of the debt settlements began to gather headway, mainly among members of the academic profession. Some of them denounced the settlements as unsound in principle and as unnecessarily increasing friction and tension between the United States and Europe. Since, however, the majority of the American people, who have little real understanding of the subject, still seem to insist on payment of the debts, it is not politically feasible for the United States Government to agree to cancellation, or even reduction, without, at least, obtaining some compensating advantage. Thus, in his annual message to Congress in December, 1932, President Hoover declared that the failure of the debtors to pay would be "an effective transfer of German reparations to the American taxpayer" and "would not be a proper call upon the American people to further sacrifices unless there were definite compensations."

The differences of opinion among Americans in regard to the debts are to some extent due to the different points of view from which they may be regarded. Thus, they may

be considered from the standpoints of law, of morals, and of economics. From the legal point of view, there is strong ground for holding that the debts are valid contracts, solemnly entered into, and therefore should be paid. The law applicable to the case, however, is not municipal but international law. A fundamental change of circumstances may be recognized by international law as releasing a nation from the obligation of a once valid treaty. Even from the legal point of view, moreover, the allied debts are unlike those of an individual whose property may be seized and sold by the sheriff if he fails to pay. No such method of enforcement exists in the case of inter-governmental debts.

From the standpoint of morals, there is room for difference of opinion. Some hold the extreme view that a government is never morally justified in repudiating a legally valid obligation. They argue also that if the debtor nations fail to pay, the burden of the debts will fall upon the shoulders of the American taxpayers, which is neither fair nor just.<sup>1</sup> Others hold that regardless of the letter of the law, the United States has no moral right to demand repayment of the debts, at least those incurred before the Armistice, since the goods which we furnished to the allies were merely our contribution to the common cause of winning the war. The argument from the standpoint of morals seems inconclusive.

The conclusive argument is that from the standpoint of economics. The "man in the street" little understands the economic forces involved, which are really the determining factor in the situation. Regardless of the method of repayment stipulated in the agreements, intergovernmental debts must be paid primarily through the expor-

<sup>1</sup> This, however, would merely involve a transfer of funds within the country from taxpayers to bondholders, who are to a large extent the same people, and no wealth would leave the country. Wealth did leave the country, however, when the debts were incurred through the shipment of foods and supplies to the Allies.



tation of goods, either raw materials or manufactured products. Invisible items, such as tourist expenditures, immigrant remittances, marine transportation and other services may help to balance accounts, but, by themselves are not usually sufficient. The transfer of gold from one country to another may also help to restore an equilibrium between countries when there is a so-called favorable or unfavorable balance of trade, but the shipment of gold cannot be kept up indefinitely from one country to another in the same direction. Thus, in the long run, economic forces substantially prevent foreign debts of any magnitude from being paid except in the form of an exportable surplus of goods. In other words, the creditor nation, if it is to be repaid, must adjust itself to a so-called unfavorable balance of trade. Its imports must exceed its exports.

After the United States became a creditor nation, it still retained a debtor-nation complex and failed to adjust its international trade position to its newly acquired creditor status. It not only maintained high tariff rates on imports but even raised them to unprecedented heights. It therefore continued to maintain a so-called favorable balance of trade and that was fundamentally the reason why the foreign debts could not be paid. For the United States to receive repayment in goods would mean that it would have to reshape radically its economic and industrial life. Even if the debts could be paid, therefore, it is extremely doubtful whether it would be to our economic advantage to have them paid. Although the amount of the debts were estimated on the basis of the capacity of the debtor to pay, their actual payment depends rather upon the capacity of the creditor to receive. By maintaining high tariff rates for the purpose of excluding foreign goods, it may be said that, while demanding repayment of the debts, we virtually prevent the demand from being complied with.

It may be asked, however, if our tariff prevents repayment of the debts, how were the debtor nations able to

meet their installments up to the time of the Hoover moratorium? The answer is that, while we appeared to be collecting these installments from the debtors, we were really paying them ourselves. Nominally, we collected billions of dollars in principal and interest, but in reality we collected practically nothing, because the debtor governments paid us, in the main, only what they were able to collect from Germany in the form of reparations and Germany paid reparations, in the main, only to the extent that she was able to borrow abroad, principally in the United States.

The debts could be repaid to the United States in goods and to our advantage if we should be caught in the same situation in which the allied governments found themselves in 1917; that is, with our man-power diverted to war and our factories and fields unable to furnish all the goods and supplies we should need. But this situation is not likely to occur.

The growing realization that the debts cannot be paid in the manner contemplated by the agreements has led to some speculation as to the possibility of compensation in other directions. Thus, it is often pointed out that the allied governments, while not paying their debts to us, are spending huge sums on military, naval, and aerial preparations for war; thus making it necessary for the United States to do likewise. It is suggested that it would be to our advantage to offer to reduce the debts in return for a commensurate reduction of naval expenditures on the part of the debtor nations. Such an offer would probably be rejected by them. Moreover, it may be pointed out that a nation's expenditures on its own navy do not involve the problem of international transfer.

Another suggestion that has been made is that the United States might accept territory in lieu of the debts. Thus, England and France might be allowed to pay their debts by ceding to us their insular possessions in the Caribbean

Sea. They would probably not be willing to cede them but, even if they were, our experiences in the Philippines and Porto Rico do not render us especially desirous of acquiring more territory of this sort. Moreover, such a transfer of territory, without consulting the wishes of the inhabitants, would violate democratic principles.

Secretary of State Hull has suggested that the debts might be paid "in kind." This suggestion seems to refer to the possibility that England might make payments on her debt by shipping to the United States certain goods not produced here, such as rubber and tin, which are produced in England or her possessions. Neither this, however, nor any of the other suggestions for compensating advantages to the United States is likely to be adopted. Europe no longer considers itself bound to pay the debts and, consequently, they have little value as a bargaining basis. The conclusion seems inevitable, therefore, that the American people must accept the prospect of ultimate reduction, and probably cancellation, of the debts. This being the case, the sooner the debt-question is eliminated from international relations, the better. If any debtor nation desires to settle its debt by making a small lump-sum payment, it should be allowed to do so by some method which reduces transfer difficulties.<sup>1</sup> Although the debts are by no means the only factor in world-wide economic depression, their elimination would probably assist in restoring world-wide prosperity. At any rate, experience has demonstrated that no one country, such as the United States, can remain prosperous for any great length of time while the remainder of the world is depressed. The prosperity of each nation is, in many ways, bound up with that of the others.<sup>2</sup>

<sup>1</sup> The Commission of inquiry into National Policy in International Economic Relations has suggested that such lump-sum payment "be effected through the transfer of securities to be obtained by foreign governments through the exchange of their bonds for American issues held by their nationals."

<sup>2</sup> Cf. H. G. Moulton and L. Pasvolsky, *War Debts and World Prosperity* (1932), Chap. XX.

## INTERNATIONAL POLITICAL RELATIONS

Although the United States is not an official member of the League of Nations, it nevertheless is obviously a member of the family of nations. As such, it is entitled to the rights and subject to the obligations attaching to members of the international community. It is, of course, impossible, under modern conditions, for the various independent nations of the world to avoid entering into relations with each other. These relations may be classified as social, economic, and political. The first two kinds have already been described. Political relations result in large measure from the first two. Political relations may exist by virtue of the mere association of nations together in the international community, or they may rest on formal contracts or treaties between them.

From one point of view, political relations between nations may be classified as peaceful, hostile, and neutral. During times of peace, nations which are recognized as independent members of the family of nations maintain diplomatic and consular relations with each other. Regular and more or less permanent representatives of each nation are sent to, and received by, others. Nations also come into peaceful relations with each other through becoming members of various international agencies, such as international bureaus or commissions, international courts, and the League of Nations. Nations may also attend general or regional international conferences held from time to time. With some exceptions, such conferences do not meet automatically at stated times but must be especially called.

Through negotiations carried on either through regular diplomatic representatives or international conferences, nations enter into treaties, or binding international agreements with each other. Bilateral treaties, or those between two nations, may embody provisions which form exceptions

to the rules of customary international law. Multilateral treaties, however, entered into by all or most of the civilized nations of the world, frequently change, develop, or extend the rules of customary international law. Such multilateral treaties thus bring under international control certain phases of national activity which had previously been exclusively under national control.<sup>1</sup>

Sometimes nations enter treaties of alliance with each other. These may be for either offensive or defensive purposes. An example was the treaty of 1778 between the United States and France. Finally, groups of nations may become members of a federation or confederation. This differs from an alliance in that the federation has a central organ or agency to attend to matters of common concern. The federation is also usually composed of more members than those contained in an alliance. The federation is the closest relation into which independent states can come with each other without merging their separate identities. Until 1789, the United States was a federation or confederation? Some writers on international relations look forward to the time when the nations of the world will form a federation similar to that of the United States before 1789. If this could be done, it would be one of the surest methods of establishing universal and permanent peace. The difficulties of establishing a world federation, however, would be much greater than were those of establishing the American federation because of the greater differences between the nations of the world in race, language, religion, and general culture.

Although a condition of peace and friendship between nations may be deemed the normal relation, nevertheless, in the past, wars have been so frequent as almost to be the more usual condition. The hope of the future welfare of mankind is largely dependent upon the possibility of

<sup>1</sup> Just as, by analogy, the Constitution of the United States brought under Federal control certain matters, such as interstate commerce, which had previously been under state control.

eliminating wars from international relations. When a nation remains at peace while others are at war, it is said to be neutral. It should be remembered that a nation might be at peace, at war, and neutral at the same time. That is to say, it might be at war with another nation, neutral towards two other nations who are at war with each other, and at peace toward all other nations.<sup>1</sup>

The World War demonstrated that it is very difficult for any strong and proud nation actively engaged in foreign trade, such as the United States, to remain neutral in the face of a general international conflict.

The World War brought home to every mind the importance of a nation's foreign relations. Before the outbreak of that conflict, few Americans would have believed that the assassination of an Austrian archduke by a subject of a Balkan state could have served as a spark to start a conflagration which would envelop not only the great powers of Europe but also the United States. Our former ideal of "splendid isolation" is certainly no longer, if it ever was, based on the facts of the situation.—Under modern conditions, it is a manifest impossibility for any nation to live entirely to itself. It is obvious that the world is not divided into watertight compartments, into one or more of which the waves of war may dash without affecting the others. The relations between the nations are so close, subtle, and manifold, the movement toward the social, intellectual, and economic interdependence of the nations has grown to such an extent, that an event of profound importance to one can scarcely occur without affecting the others. A war, in whatever part of the world, can no longer be dismissed as a matter of no importance to the nations at large. It would now be rash to assert that there is any international dispute with which the United States has absolutely no concern. Nevertheless, the hope that the

<sup>1</sup> Any member of the League of Nations, however, which resorts to war in disregard of its covenants is supposed to have committed an act of war against all other members. Covenant, Art. XVI.

United States may remain neutral even in the face of another so-called world war need not be given up altogether if a realistic attitude is adopted regarding the causes which may involve us in the conflict. In spite of the World War and subsequent events, the concept of neutrality is not dead.

In spite of the growing interdependence of the nations, the world still consists of a society of so-called sovereign states: As such, they claim to be not only completely in control of their internal affairs, but also completely free from any external legal control. This doctrine of the external sovereignty of states in its extreme form is associated with an exaggerated nationalism. Patriotism is an admirable trait within limits, and the man who does not love and revere his country and is not willing to make whatever sacrifices may be necessary on its behalf, is indeed a pitiable spectacle. But when not imbued with reason and intelligence, patriotism may in some cases degenerate into jingoism or chauvinism. Persons of this stripe are found in every country. They are usually very articulate and make a noise quite out of proportion to their strength in numbers. That they do not express the sentiments of the country as a whole may not always be understood by other peoples. International misunderstandings arise which may eventually lead to war and were originally caused by insult rather than by injury. Hence, it is desirable that nations, like individuals, should cultivate courtesy and good manners in their dealings with each other. If the nation's claim of external sovereignty is construed to mean that nations in their international dealings may pursue any line of policy or conduct they please, it is not in accordance with the facts of the actual situation. In such dealings, nations have imposed upon them various obligations laid down by the body of rules and regulations known as international law, which, through long centuries of development, has grown up to govern the conduct of nations.

Treaty obligations also place limits upon the conduct of nations, but these are technically voluntary self-limitations. On the other hand, the limitations of international law may be largely involuntary as far as any particular nation is concerned. It is true that in part it has been reduced to writing in the form of general multilateral treaties, such as those adopted at the Hague Conventions of 1899 and 1907. In part, however, it is unwritten, resting upon usage, custom, and general international practice. Its content may be divided into the law of peace, the law of war, and the law of neutrality. Although international law is supposed to apply to the conduct of nations both in war and in peace, nevertheless the old adage, "In the midst of arms, the law is silent," undoubtedly has much force. In time of war, the doctrines of military necessity or the excuse of prior breach by the enemy may afford occasion for overriding the law. At such times, violations of international law are likely to be more serious and frequent, because the temptation to such conduct is greater, as a rule, than during peace. Nevertheless, it would be a misapprehension to suppose that international law is abrogated or entirely suspended during time of war. At such a time, violations of the law of nations attract more attention and are likely to give an exaggerated impression of their importance and frequency.

For its enforcement, international law depends largely upon the public opinion of the civilized nations, or upon general international consent. Although there are international courts, there is no official international sheriff to enforce their decisions. The method of enforcing international law is not so different, however, from that of enforcing domestic or national law as might at first be supposed. The enforcement of the latter also rests at bottom upon the support of public opinion.

Mutual convenience and considerations of reciprocity are usually sufficient to impel obedience to international law. If, nevertheless, a nation deems that another with



which it has relations has violated the obligations of international law or treaties, it may resort to diplomatic protest. If it is unable to obtain satisfaction in this way, it may demand that the controversy be submitted to the Permanent Court of International Justice or to a court of arbitration. If this demand is refused, or if the decision or award of the court is not complied with, resort may be had to reprisals, which may finally lead to war. The theory of the Covenant of the League of Nations is that the just complaint of one nation that another has violated international law or treaties is the concern of all the members. Except under the urge of dire necessity, a nation cannot as a rule afford to defy the whole civilized world. It is true that the means of enforcing international law need to be strengthened. Even under present conditions, however, a nation which habitually violates important and fundamental rules of international law, albeit under the provocation of war, is likely ultimately to be brought to retribution through the united force of the civilized nations.

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## CHAPTER II

### THE DEVELOPMENT OF AMERICAN FOREIGN POLICY

**F**OREIGN policy consists of the measures and attitudes adopted by a nation in its relations with other nations, regions, and international institutions. Such policy is generally based upon the prevalent conception as to what measures and attitudes will best promote the national interest. The determination of the foreign policy of the United States has been conditioned by various factors, such as the nature of its origin, the character of its population, its geographical location, and the extent of its territory.

During the colonial period, the embryonic American nation was bound, legally, politically, and economically, with the mother country. Since the only feasible means of transportation were the waterways, trade was not so much inter-colonial as it was between colony and mother country. Freedom of trade with other countries was restricted by navigation laws and other imperial regulations. At that time, if war broke out in Europe, not only could we not remain indifferent, but we were even more likely than now to become involved as participants. Thus, the Seven Years' War was fought partly in America, though originating from causes that did not directly concern the colonists. The English historian, Macaulay, has graphically pointed out that the result of Frederick the Great's seizure of Silesia was that "black men fought on the coast of Coromandel and Red men scalped each other by the Great Lakes of North America."<sup>1</sup>

<sup>1</sup> Quoted in A. T. Mahan, *The Interest of America in International Conditions* (Boston, 1910), 9.

Although the Declaration of Independence of 1776 and the successful Revolutionary War made us legally independent of Great Britain, we were still politically and economically dependent upon Europe. Even while the war was still going on, we recognized that fact by entering into the only treaty of alliance that we have ever made with any European power. This was the treaty of 1778 with France, and the results of that treaty have had a far-reaching influence upon the foreign policy of the United States.

Throughout our history, the foreign policy of the United States has been the product of conflicting forces. On the one hand, our comparative geographical isolation tended to enable us to avoid European entanglements and, with the extension of our territory across the continent, our attention became more directed toward internal development. On the other hand, the fact that the American settlers came from Europe, and principally from the British Isles, helped to maintain racial and cultural ties with the former mother country even after legal separation. Moreover, our principal trade relations, both imports and exports, were with England. Furthermore, it should be noted that geographical isolation is a relative term. The physical separation from Europe by an ocean three thousand miles wide has of late years become a factor of less importance than formerly because of increasingly rapid and easy means of transportation and communication, such as swift ocean liners, the cable, wireless and transatlantic airships and telephone.

#### THE EUROPEAN BALANCE OF POWER

On many occasions the foreign relations of the United States have been affected by the fact that Europe has not been united, but has rather been divided into more or less hostile groups of powers. Without the balance of power

in Europe, our history would undoubtedly have been widely different. We were assisted in securing our very independence through the rivalry between France and Great Britain. We were able to preserve that independence and to consolidate our national position during the early period of our military and naval weakness because Europe was in the throes of a long struggle following the outbreak of the French Revolution.<sup>1</sup> The diversion of the energies of Europe through that struggle also enabled us to obtain by peaceful means settlement of troublous boundary disputes with Great Britain and Spain.<sup>2</sup> The Napoleonic wars so occupied the energies of France that she was willing to sell the vast Louisiana Territory to the United States rather than to send forces to hold it. Thus, through war in Europe, this rich prize fell into the hands of the United States without the striking of a single blow.<sup>3</sup>

During the War of 1812, the United States was not crushed by the superior might of Great Britain because most of her forces were needed to fight Napoleon.<sup>4</sup> After the Napoleonic wars the nations of Europe were too exhausted to make any serious attempt to deprive the United States or the former Spanish colonies of their independence. Moreover, as usual, they were divided. Had England joined the members of the Holy Alliance, we probably should not have been able to maintain the Monroe Doctrine. If, during the Civil War, the powers of Europe had unitedly recognized the Confederacy and joined France in the Mexican venture, our very national existence would have been seriously menaced. From these examples, and

<sup>1</sup> This struggle also permitted most of the Spanish colonies in the Western Hemisphere to obtain their independence.

<sup>2</sup> Through Jay's Treaty of 1794 and Pinckney's Treaty of 1795 respectively.

<sup>3</sup> S. F. Bemis, *Diplomatic History of the United States* (New York, 1936), pp. 134-137.

<sup>4</sup> The United States, of course, would not have become involved in the War of 1812 if a major European war had not been in progress. Cf. Bemis, *op. cit.*, pp. 160, 167.

others which might be cited,<sup>1</sup> it is obvious that the foreign relations of the United States and, indeed, the very course of our national history, have been vitally affected by the disunity and struggle for power in Europe.

#### THE EARLY PERIOD

This period in the development of American foreign policy extends from the beginning of our national existence to the promulgation of the Monroe Doctrine in 1823. During most of this period, Europe was at war, and this fact affected our foreign relations, both favorably and unfavorably. It enabled us to maintain our independence during the weak stage of our development, but, on the other hand, it made it difficult, if not impossible, for us to avoid becoming involved in the European struggle. In 1793, upon the outbreak of war between France on one side and a group of European powers headed by Great Britain upon the other, Washington issued his celebrated proclamation of neutrality.<sup>2</sup> During most of the period of the Revolutionary and Napoleonic wars, the United States was the principal neutral power in the world, but, unfortunately, we were unable to maintain our neutrality continuously to the end, as is evidenced by our partial war with France in 1798 and the War of 1812 with Great Britain. Although, when the great powers of Europe were engaged in a tremendous struggle, our position must necessarily have been difficult, the difficulty was enhanced by internal strife and bitterness between factions and parties. The Federalists sided with Great Britain and the Anti-Federalists, or Jeffersonians, sided with France, and party issues and divisions in this country were largely determined by foreign, rather than by domestic, affairs.

<sup>1</sup> Such as the acquisition of Florida from Spain in 1819, because Spain alone was unable to hold this territory and she could not obtain the assistance of Great Britain in holding it. Bemis, *op. cit.*, pp. 188, 195.

<sup>2</sup> Text in Appendix I.

Although Washington was able to maintain neutrality as long as he held the reins of government, he realized the gravity of the situation and the danger to our safety and happiness which would result from becoming engaged in the struggle of the European powers. It was doubtless this situation and the unfortunate experience of the French alliance which Washington had largely in mind when he touched upon our foreign relations in his Farewell Address to his fellow-citizens. His language is of such importance as to justify quotation at some length. He said:

“The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations, to have with them as little *political* connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop.

“Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities.

“Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, the period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.

“Why forego the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor, or caprice?

"It is our true policy to steer clear of permanent alliances with any portion of the foreign world, so far, I mean, as we are now at liberty to do it; for let me not be understood as capable of patronizing infidelity to existing engagements. I hold the maxim no less applicable to public than to private affairs that honesty is always the best policy. I repeat, therefore, let those engagements be observed in their genuine sense. But in my opinion it is unnecessary and would be unwise to extend them.

"Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies. . . .

"With me a predominant motive has been to endeavor to gain time to our country to settle and mature its yet recent institutions, and to progress without interruption to that degree of strength and consistency which is necessary to give it, humanly speaking, the command of its own fortunes."

It will be noted that in this address Washington did not use the phrase, "entangling alliance," which was later given currency by Jefferson. What he warned his fellow-countrymen against was any permanent alliance with European powers. This was the sort of alliance which was common among those powers, and of this sort was the alliance which we then had with France. He expressly recognized, however, that in the course of events it might become expedient for us to enter into temporary alliances for extraordinary emergencies. There seems to be, therefore, no just ground for interpreting his advice as opposed to any participation of the United States in world affairs. It does not follow that we should become embroiled in matters that do not concern us. Each case or question of foreign policy should be considered on its own merits, with a view to existing conditions and in the light of applicable principles.

Washington's warning against permanent alliances was strongly endorsed by Jefferson when he became President.

In his first inaugural address he asserted that one of the essential principles of our Government, which ought to shape its administration, was "peace, commerce, and honest friendship with all nations, entangling alliances with none." Again, he declared, "Our first and fundamental maxim should be never to entangle ourselves in the broils of Europe." The experiment of democracy in the United States was on trial. It was essential for its success that we should be free from entanglements in the European political system. Jefferson's advice, coupled with that of Washington, has had a far-reaching influence upon our foreign policy. Certainly we have never again entered into such a treaty of alliance as that which we made with France in 1778. Occasionally it has been alleged by ill-informed writers that we were in secret alliance with some power, such as Great Britain. Other nations have sometimes entered into secret treaties of alliance with each other, but with us it is impossible, because treaties must be submitted to the Senate and consequently cannot be kept secret. Although it is common to speak of our "allies" in the World War, strictly speaking, we were merely associated, rather than allied, with them.

We have, however, by no means pursued throughout our history a consistent policy of non-coöperation with other nations in matters of general concern. Many instances can be cited in which the United States has joined with other powers in assuming the common responsibilities of civilized nations. Washington, Jefferson, and contemporary statesmen were able students of international politics. They were not doctrinaires, who elevated a theory into a fetish, but rather guided the affairs of state in accordance with practical considerations. They sought to promote our national interest without sacrificing high principle and a just regard for other nations. Jefferson, strong isolationist as he was, was ready on occasion to make common cause with one European power against another. When, in 1802,



he learned of the Treaty of San Ildefonso whereby Spain, even then a comparatively weak power, ceded the Louisiana Territory to France, he said: "The day that France takes possession of New Orleans fixes the sentence which is to restrain her forever within her low-water mark. It seals the union of two nations, who, in conjunction, can maintain exclusive possession of the ocean. From that moment, we must marry ourselves to the British fleet and nation." Our purchase of Louisiana from France in the following year rendered it unnecessary to carry out this design.

Jefferson was also responsible for taking up the "white man's burden" against the Barbary states. A considerable portion of American foreign commerce went into the Mediterranean, where it was preyed on by Barbary corsairs. Practically all the European powers paid tribute to these states in order to protect their commerce. For a time the United States did the same. Jefferson, while representing the United States in Paris had attempted unsuccessfully to form an association of powers for the purpose of dealing unitedly with the Barbary pirates. On becoming President, he decided that war was preferable to the continued payment of tribute. He consequently sent a small squadron of frigates to the Mediterranean, which, after sharp engagements, was able to bring the Bey of Tripoli to terms. In some respects this action of ours was a forerunner of our armed intervention on a much larger scale in the World War in 1917.

During the time that we were engaged in developing our position at home, rounding out our boundaries, healing internal dissensions, and growing into a strong nation, Washington's advice, properly interpreted and applied, was undoubtedly sound. It was extremely fortunate for us that, during the early years of our history we were able to extend our territory through the acquisition of the Louisiana and Florida territories. From the standpoint of our

foreign relations, the importance of these additions to our territory was that, with the exception of Canada on the north, they eliminated from our immediate boundaries all territory under European control. By the middle of the nineteenth century our boundary difficulties with Canada had been settled and our territory had been extended across the continent from ocean to ocean. We had thus reached a position where we were not likely to be disturbed by vexatious boundary disputes, at least as far as our continental domain was concerned. Moreover, the revolt of the Spanish colonies in America and the attainment by many of them of their independence early in the nineteenth century were events which probably assisted us in avoiding European contacts.

#### THE MIDDLE PERIOD

The period from the issuance of the Monroe Doctrine in 1823 to the Spanish-American War was one of comparative quiescence as far as our foreign relations were concerned. We continued our territorial expansion during that period through the recognition by Great Britain of our claim to the Oregon Territory, the annexation of Texas, the acquisition of the territory in the Southwest as a result of the Mexican War, the Gadsden Purchase, and the purchase of Alaska. These extensions of territory rounded out our continental domain. -

During this period, the attention of the people of the United States was very largely centered upon the development of the resources of their vast domain and upon the settlement of important internal questions, such as those of slavery and state sovereignty. These matters naturally distracted popular attention from all except the most pressing questions of foreign policy. Moreover, until these important internal matters were satisfactorily settled, the nation was not in a position to play any very active rôle in

foreign affairs. Lincoln declared that the nation could not permanently endure half slave and half free.

The ensuing Civil War involved some foreign complications. Among these was the controversy with France over the invasion of Mexico, and the controversies with Great Britain over the Trent affair and over the depredations of the Confederate Cruiser *Alabama*, which was later settled by arbitration. When, after the reconstruction period, the wounds and dissensions of the Civil War were largely healed and the question of state sovereignty was settled, we were in a position to pursue a more effective foreign policy.

#### THE LATER PERIOD

This period begins with the Spanish-American War of 1898, which is one of the most significant dates in American diplomatic history. Although the immediate object of that war was the liberation of the Cuban people, its results were much more far-reaching. It definitely launched the United States upon the career of a world power. Curiously enough, although the war was fought over Cuba, and our political and economic interests in that island were very great, we did not acquire it; while, on the other hand, we did acquire the Philippine Islands, far removed from our own territory and wherein our interests were small. This has been termed the "great aberration."<sup>1</sup> This was due to the fact that the war was entered into and carried on without a clearly thought out policy based on national interests. Through the more or less accidental acquisition of the Philippines, we became unnecessarily involved in Far Eastern affairs and embarked upon an imperialistic career which we were destined later to regret.

Not only did the Spanish War result in the acquisition of far-flung territories, but it also inaugurated a period during which the United States participated generally to a

<sup>1</sup> S. F. Bemis, *op. cit.*, Chap. XXVI.

greater extent in international affairs. During the previous period, the United States had sent delegates to the conferences held at Berlin in 1884 and at Brussels in 1890 for the purpose of adopting regulations regarding the African slave trade and the status of the Congo Free State. It is true that the treaty adopted at the first of these conferences was not submitted to the Senate for ratification, while in the second case the Senate paid homage to the policy of aloofness by inserting a reservation disclaiming any interest on our part in the possessions or protectorates of other powers in Africa.

After the beginning of the twentieth century, however, the extent of American participation in international conferences considerably increased. Outstanding among these were the Hague peace conferences of 1899 and 1907, the conferences at Paris in 1919 to draw up the treaty of peace at the conclusion of the World War, and the Washington Conference of 1921 called by ourselves to consider questions relating to disarmament and the Far East. These, however, were conferences called to consider matters, not only of international, but of world-wide, concern, and it was natural that the United States, as one of the leading world powers, should be sufficiently interested to participate. In the case of the Paris Conference, moreover, we participated not merely as a leading world power but as a belligerent in the World War.

One of the greatest departures from the policy of aloofness which we have ever made was our participation in the Algeciras Conference of 1906. It is not surprising that this should have occurred during the administration of President Theodore Roosevelt, who seldom hesitated to break a precedent when it stood in the way of accomplishing the object he had in view. Instead of being concerned with a matter of general international concern, this conference was called primarily for the purpose of settling the conflicting claims of France and Germany in Morocco.

Our participation was based ostensibly upon a commercial treaty of 1880 with Morocco, but, in reality, we had little interest, commercial or otherwise, in that country. It was our very disinterestedness which enabled our delegates to exercise a large influence in securing the recognition of the claims of France, and thus to help in maintaining the balance of power in Europe. Nevertheless, our participation in this affair received very severe criticism in the Senate, and when the treaty drawn up at the conference came before that body for approval, it inserted a reservation intended to safeguard the policy of aloofness and reciting that our participation in the conference was "without purpose to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope."

As we have seen, the United States has occasionally protested in the name of humanity against cruel treatment of oppressed people in other countries and has interceded diplomatically in their behalf. As a rule, the United States has declined to join with other powers in offering mediation or good offices in order to prevent the outbreak of war. When war exists, however, our Government is sometimes willing to assume some responsibility in attempting to bring it to an end. One of the reasons why President Wilson maintained our neutrality for so long after the outbreak of war in Europe in 1914, in spite of repeated provocation to war, was because of his hope that ultimately we would be in a position to mediate between the warring groups of powers. During the Russo-Japanese War of 1905, President Roosevelt interposed his good offices in order to restore peace between the contending powers. Through his efforts a conference was held at Portsmouth, New Hampshire, at which a treaty of peace was signed.

Although the United States has frequently declined to take joint action with other powers in Europe, it has been

more inclined to coöperate with them in dealing with the affairs of the Pacific and the Far East. As early as 1889 we assumed a joint protectorate with Great Britain and Germany over Samoa, an action which aroused very severe criticism at the time as a departure from our usual policy of aloofness. One of the best examples of coöperative action on our part in the Far East was our participation with the other powers in the joint expedition of 1900 against the Boxers in China. As will be seen in a later chapter, we exerted a helpful influence in moderating the severity of the terms which the other powers were inclined to impose upon China in that case.

Enough has been said to show that throughout our history there have run two opposing tendencies, one making for aloofness, the other for international coöperation. There have, of course, been ups and downs and a swinging of the pendulum back and forth. Since 1898 the pendulum has swung very decidedly toward a fuller measure of participation in world affairs. This has been due in part to the extension of our territory so as to include far-flung possessions in other quarters of the globe. Frequently, however, government and people have been divided on the question and have attempted to compromise between the extremes of isolation and coöperation. The Senate has usually been hidebound in its devotion to the traditional policy of isolation, while several of the presidents, especially Theodore Roosevelt and Wilson, have evinced a willingness to go very far in the direction of international coöperation and participation in world affairs. Being in closer touch with those affairs than was the Senate, they were more willing to adopt a policy in harmony with actual conditions.

The greatest departure in our history from the policy of aloofness was our participation in the World War. President Wilson, in his public utterances both before and after our entrance into that war, undertook to state the prin-

ciples justifying this departure. In 1914 he had followed the traditional policy by counselling the American people to remain neutral not only in act but also in thought. In 1917, however, with high idealism and crusading enthusiasm he preached the duty of America to go to the defense of the rights of humanity and of small nations. In his view, the world could not permanently remain half democratic and half autocratic. In unforgettable phraseology he declared that the world must be made safe for democracy. War, he admitted, was bad, but peace with loss of self-respect was worse. We entered the war, he claimed, with no selfish purpose nor imperialistic motive. In his war addresses, Wilson showed himself to be our greatest anti-isolationist, yet, in advocating a league of nations he paid deference to the policy of aloofness by arguing, as he did in his address to the Senate of January 22, 1917, that "there is no entangling alliance in a concert of power." Rather, he spoke of it as a "disentangling alliance."

During the World War, under the leadership of Wilson, the United States rose to the heights of international idealism. In the ardent glow of this idealistic spirit, our government unfortunately lost sight of certain practical considerations. As far as the protection of our national interests was concerned, it would probably have been sufficient to confine our warlike operations to the high seas. It is doubtful whether any commensurate advantage for the United States could have been expected from the expense and loss of life involved in sending two million troops to European soil. At any rate, before transporting this army to Europe, we should have exacted from the allies definite and binding pledges that a victorious peace should conform to the enlightened principles for the establishment of which Wilson claimed that we were entering the war. If such agreements had been made and carried out, it would have been possible to avoid many of the mis-

takes and disappointments embodied in the Treaty of Versailles.

In the United States a natural reaction set in after the war, which led to a general withdrawal from participation in European affairs. After the prodigious efforts involved in the most stupendous transportation of troops, munitions and supplies from one continent to another that has ever taken place in the history of the world, the American people desired above all things else to get back, if possible, to normalcy. It was this reaction, doubtless accentuated to some extent by the exigencies of party politics, which led to the refusal of the United States to become a member of the League of Nations.

The international spirit is a slow growth and in most countries is not yet very strong. National interest rather than international helpfulness is the aim of most governments. This is true of the nations of Europe as well as of the United States. A government, doubtless seeing the world situation more clearly than do the masses of its people, may endeavor to lead them toward a more international way of thinking. It must be remembered, however, that traditional policies, embedded in the national consciousness, die hard, and, although a government should doubtless lead, it should endeavor to avoid leading too far in advance, for its loss of touch with popular opinion may bring about a severe reaction. In general, the United States is now willing to coöperate with Europe in peaceful enterprises, especially those of a technical character. We still cling, however, to our traditional policy of having as little political connection with Europe as possible. The greatest problem of statecraft connected with our foreign policy now before the American Government and people is how to fulfill our national duty of international helpfulness and coöperation in the promotion of world peace and reconstruction without becoming involved in the settlement of



numerous questions arising in various quarters of the globe which directly concern us little or not at all.

### CONCLUSION

Surveying as a whole the history of American foreign policy, it would seem that our diplomacy during the periods down to 1898 was much more successful than it has been since that date. Various blunders, both of a minor and of a major character, have been committed by our diplomats during this later period. Of these, our unconditional entrance into the World War with all available resources, both military and financial, while laboring under the hallucination of "making the world safe for democracy," was the most colossal. Other blunders of a lesser but still grave character were our imperialistic policy toward Latin-America, including the taking of the Panama Canal Zone, and the acquisition of the Philippine Islands with subsequent attempts on our part to bring about the settlement of affairs in the Far East in which our interests were not sufficient to justify our interposition.

A study of our diplomatic history during the twentieth century leaves the impression that our government has inclined too much toward laying down general principles of policy in regard to foreign situations, while failing to remember that such principles may not be generally applicable and that each situation requires its own special approach. A study of this period also engenders the suspicion that some of our secretaries of state have at times been led into making costly diplomatic mistakes by the desire for the personal prestige to be derived from having their names associated with some supposed master stroke. They have also sometimes shown themselves to be too prone to give unwanted advice to the rest of the world. They, as well as many other Americans, have been hypnotized

by delusions of grandeur involved in the ideas of "manifest destiny" and the "United States as a world power."

In recent years, however, and especially since about 1930, there is noticeable an effort on our part to rectify as far as possible the errors of our twentieth century diplomacy. This tendency has been manifested with respect to all three regions of the world with which we have important relations, Europe, Latin-America, and the Far East. Thus, we have abandoned the Roosevelt corollary to the Monroe Doctrine which led to our imperialistic policy in Latin-America, and have substituted for it the policy of the "good neighbor." Again, we have taken steps for withdrawal from the Philippines, and from the responsibilities in the Far East which possession of those islands entails. Furthermore, we have endeavored to adopt a more cautious neutrality policy in the face of threatened war in Europe. Finally, we have attempted to remove some of the economic causes of unfriendliness between nations by offering to negotiate reciprocal trade agreements with countries in all parts of the world.

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## CHAPTER III

### THE MONROE DOCTRINE

#### HISTORICAL ORIGIN

THE celebrated doctrine of Monroe, the most important and influential of all American foreign policies, was a natural outgrowth of the situation in which the young American nation found itself in the early part of the nineteenth century. We have already seen the circumstances which led to the enunciation of the policy of isolation or non-participation in European political affairs. We were as yet comparatively weak and were conducting in the New World an experiment in democracy, the success of which might be endangered through becoming embroiled in European political quarrels. It was felt by the statesmen of the time that intervention by European monarchical governments in the affairs of the Western Hemisphere would also endanger our peace and safety. The idea was expressed in the phrase, "America for the Americans." Jefferson declared in 1808 that one of the objects of our foreign policy should be to exclude European influence from this hemisphere. As already noted, he was of the belief that "our first and fundamental maxim should be, never to entangle ourselves in the broils of Europe." To this he added: "—our second, never to suffer Europe to intermeddle with cis-Atlantic affairs." Thus, the idea embodied in the Monroe Doctrine, that there is a natural separation between American and European political affairs, was already being evolved several years before the formal promulgation of the Doctrine.

The immediate circumstances which led to the enunciation of the Monroe Doctrine consisted of two factors, each involving threatened aggression in the Western Hem-

isphere by a European power or coalition of powers. The first was the threat of the Holy Alliance against Spanish-America and the second was the threat of Russia against our territorial possessions in the Northwest.

The unsettled conditions in Europe due to the Napoleonic Wars afforded an opportunity to the oppressed Spanish colonies in South America to throw off the yoke of the mother country, and they accordingly declared their independence. While the war raged, comparatively little was done to bring them back under their former allegiance, but, with the overthrow of Napoleon and the restoration of Ferdinand VII to the throne of Spain, more active efforts were made to force them to acknowledge the sovereignty of their Spanish master. Upon the conclusion of our war with Great Britain in 1815, the United States adopted an attitude of neutrality between Spain and her revolted colonies. Two years later President Monroe sent special commissioners to South America to investigate the situation and to report on the prospects of independence for the colonies. We then merely waited for a propitious moment to extend to them recognition of independence.

Meanwhile, the United States was negotiating with Spain for the cession of Florida. Although the treaty was signed in 1819, ratifications were not finally exchanged until two years later. Until this transaction was completed, our Government deemed it prudent not to antagonize Spain by recognizing the independence of the colonies. Early in 1822, decisive victories were gained by the struggling colonies and this gave the signal for the extension of recognition by the United States. Meanwhile, Russia gave signs of encroaching upon the Northwest coast, through a ukase issued by the Czar in 1821 claiming that coast down to the fifty-first degree of latitude and assuming exclusive jurisdiction over the Bering Sea.

The principal menace, however, was from the so-called

Holy Alliance, composed of Austria, Russia, and Prussia, all reactionary monarchical governments. They called themselves holy, partly because they sought to uphold the principle of legitimacy which they claimed to be based upon divine right. This principle required not only that the monarchs who had been on the thrones of Europe before the Napoleonic upheaval should be restored to their thrones, but also that their ante-bellum territories should be restored to them intact. As applied to Spain, this required the restoration of Ferdinand VII as king of that country, which the allies accomplished, and also the restoration to him of the revolted Spanish colonies in South America.

In respect to the latter design, the allies ran counter to the interests not only of the United States but also of Great Britain. Until the time of the Congress of Verona in 1822, Britain had acted more or less in concert with the Allies. It then clearly appeared, however, that they were bent on making the world safe for autocracy, which was hardly in consonance with the spirit of the British Government. A more important reason why England ceased to act with the Allies was that a considerable amount of trade had developed between England and the revolted colonies in South America, and their restoration to Spain would naturally have the effect of largely curtailing this trade, if not of destroying it altogether. England therefore desired that the independence of the colonies should be maintained, although, on account of the complications of European politics, she deemed it unwise to extend recognition to them at that time.

The interests of the United States coincided with those of Great Britain, although for somewhat different reasons. We had developed some trade with the revolted colonies. A more important consideration with us, however, was the feeling that the machinations of the Holy Alliance threatened democratic government everywhere and we could not,

therefore, remain indifferent to the fate of the South American republics. There was, we felt, an irreconcilable conflict between the principles of autocracy and democracy. Although we were hardly in a position to fight for the cause of democracy in Europe, we felt that when the very existence of democracy in the Western Hemisphere was threatened, we should take a firm stand. For the time being, we ourselves were not directly, nor even indirectly, threatened, but, if the revolted colonies were forcibly brought back under the yoke of Spain, it would not only be a blow at the prestige of the United States, which had recognized their independence, but, our Government thought, we ourselves would possibly be the next victim of the allies' fury.

Under these circumstances, Great Britain suggested to the United States that the two governments unite in joint action against the designs of the allies. President Monroe was at first inclined to receive this suggestion favorably, and in this opinion he was seconded by the elder statesmen, Jefferson and Madison. Had the British Government been willing to recognize at the time the independence of the South American republics, a joint declaration would probably have been issued. Eventually, however, Monroe decided on a unilateral declaration, largely on account of the influence of his Secretary of State, John Quincy Adams, who feared that in any joint action with Great Britain, the United States would have to play a secondary rôle. He also apparently felt that the principle of "America for the Americans" precluded our joining with any European power in enunciating a policy relating to America.

The Monroe Doctrine as finally issued was embodied in the annual message to Congress, December 2, 1823. It is found in two widely-separated passages in that message, one passage relating to the Russian encroachment in the Northwest and the other to the designs of the Holy Alliance. In combination, these passages read as follows:

“A precise knowledge of our relations with foreign powers as respects our negotiations and transactions with each is thought to be particularly necessary. Equally necessary is it that we should form a just estimate of our resources, revenue, and progress in every kind of improvement connected with the national prosperity and public defense. It is by rendering justice to other nations that we may expect it from them. It is by our ability to resent injuries and redress wrongs that we may avoid them.

“At the proposal of the Russian Imperial Government, made through the minister of the Emperor residing here, a full power and instructions have been transmitted to the minister of the United States at St. Petersburg to arrange by amicable negotiation the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal had been made by His Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. The Government of the United States has been desirous of this friendly proceeding of manifesting the great value which they have invariably attached to the friendship of the Emperor and their solicitude to cultivate the best understanding with his Government. In the discussions to which this interest has given rise and in the arrangements by which they may terminate the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European powers.

“It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appeared to be conducted with extraordinary moderation. It need scarcely be remarked that the result has been so far very different from what was then anticipated. Of events in that quarter of the globe, with which we have so much intercourse and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars

of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments; and to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States. In the war between those new Governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered, and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of the Government, shall make a corresponding change on the part of the United States indispensable to their security."

Monroe thus undertook, in effect, to lay down the principle that the Western Hemisphere must be made safe for democracy. It was a declaration of independence and security for the states of South America. It must not be



supposed, however, that the Doctrine was intended to be mainly altruistic. The object which Monroe and his Secretary of State had primarily in view was the safety and protection of the United States. Some evidence of this was given at the time of the Panama Congress in 1826. The instructions given our delegates to that gathering showed that the United States did not undertake to guarantee the principles of the Doctrine for the protection of the South American states. It happened, however, that under the circumstances existing at the time of the original promulgation of the Doctrine, the protection of those states from European intervention was closely bound up with the maintenance of our own security and independence.

The Doctrine was regarded by the members of the Holy Alliance as unwarranted presumption on the part of the United States. Yet, without the assistance of England, they were not in a position to defy us. Undoubtedly, the announcement of the Doctrine has had large influence in preventing, in South America, the same sort of scramble among the European powers for colonies and spheres of influence which has taken place during the past century in Asia and Africa.

The Monroe Doctrine was a declaration of national policy put forth to meet a particular emergency. It was not a part of international law. To some extent, it was inconsistent with international law. Thus, it denied the right of European powers to take possession of territory in the Western Hemisphere, although international law recognizes the right of a nation to appropriate unoccupied or unclaimed territory wherever it may be found. This, however, was unimportant, since there was practically little or no such territory in the Western Hemisphere. Again, the Doctrine denied the right of the members of the Holy Alliance to intervene in the affairs of the South American states, although international law recognizes the right of intervention under certain special circumstances, as for purposes

of reprisal, protection of national rights and self-preservation. As a general rule, however, international law requires every state to respect the sovereignty and independence of every other state and its right to freedom from intervention. To this extent the Monroe Doctrine is in harmony with international law.

Although the Doctrine was intended to meet a particular emergency, it was couched in general terms, and was thus broad enough to state our position whenever encroachments of a particular character might be threatened in the Western Hemisphere. An encroachment which comes clearly within the scope of those denounced by the Doctrine occurred during our Civil War. This was the French intervention in Mexico. The situation in that country was unsettled, and, under the circumstances, Napoleon III of France seems to have conceived the plan of restoring French influence in America. Ostensibly, however, his expedition was intended merely to enforce the payment of claims through the seizure of Mexican ports and taking over of custom receipts. He induced England and Spain to go in with him, but when the governments of those countries perceived that France had ulterior motives in the affair, they withdrew their support. Napoleon nevertheless persisted and succeeded in 1864 in having the Archduke Maximilian of Austria accept the crown of Mexico bolstered up by French troops. Our Secretary of State, Seward, protested against the French intervention, but, so long as the Civil War continued, the United States Government could do no more than make rather mild diplomatic representations. After that conflict had ended, our protests became more emphatic, and the possibility of the expulsion of the French from Mexico by force was contemplated. This proved unnecessary, however, partly because of the determined stand of the Mexicans against the invaders and partly because Napoleon, possibly already sensing the difficulties which were soon to draw France into the Franco-

Prussian War, agreed to withdraw his forces from Mexico. Maximilian was shot by the Mexicans, and thus ended this ill-fated enterprise.

This attempt to establish a monarchy under European control on the ruins of an American republic and in close proximity to the United States was obviously the sort of thing which the Monroe Doctrine had been intended to prevent. Yet, throughout the diplomatic interchanges, Secretary Seward never once mentioned the Doctrine. The reason for this was that we were able to base our protest on the strong ground of self-defense, and the invocation of the Doctrine in order to secure popular support for the Government's policy was therefore unnecessary.

#### EXTENSIONS OF THE DOCTRINE

Conditions have changed so greatly since 1823 that if the Monroe Doctrine were to be confined to the precise meaning which it bore at the time of its original promulgation, there is much reason to believe that it would now be substantially obsolete. There was no intention that it should be binding upon the nation for all future time. What goes by the name of the Monroe Doctrine, however, is not only not obsolete but seems, on the contrary, to be endowed with perennial life. Two reasons for this situation may be noted. First, the Doctrine early acquired a great ascendancy over the minds of the American people. It has come to be considered by the average American with as much reverence as he regards the Declaration of Independence, or the Constitution. Like the ark of the covenant, it must not be touched. No political party that has any hope of success at the polls would dare place in its platform a plank denouncing the Doctrine or disparaging it in any way. Many thousands of people who revere the Doctrine have, however, no clear conception as to what it means at any particular time. This is partly due to the fact that the

Doctrine, like the Constitution, is continually expanding to meet new conditions. This expansion has developed to such an extent that it seems to have gone very far afield from the Doctrine as laid down originally.

In the second place, what goes by the name of the Monroe Doctrine continues as an active, dynamic principle of American foreign policy because it is constantly being invoked by the Government as justification for its acts or by writers who seek to justify the Government. This practice is based on the principle of following the political line of least resistance. To secure popular support for a Government policy or act that is admittedly new would require much persuasion and long-drawn out argument, and, even then, success could hardly be expected except in cases of emergency. To convince the people, however, that the new policy is based on the Monroe Doctrine is to win the battle at the outset. Since the mass of the people do not know precisely what the Doctrine means, it is not difficult to convince them that the new policy is based on it, even though, in fact, it may be only very remotely related to the Doctrine as originally formulated.

. It is not intended by the above observations to imply that the Government is guilty of misrepresentation. In the case of many of the extensions of the Monroe Doctrine, something may be said for the position that they are natural or logical corollaries therefrom. There is no current official definition of the Monroe Doctrine by which accurately to gage the Government's policy. Moreover, whether or not such act or national policy can properly be brought within the scope of the Doctrine is not the sole criterion as to its wisdom or expediency. It may be the best policy for the Government to pursue, all things considered, even though it has no real connection with the Doctrine.

The various applications and extensions of the Monroe Doctrine are usually for purposes of convenience so called, although it might clarify matters somewhat if they were

associated rather with the name of the president or statesman who was mainly instrumental in stating them or in carrying them out, as, for example, the Polk Doctrine or the Roosevelt Doctrine.

*The Polk Doctrine.* In his annual message to Congress of December 2, 1845, President Polk declared that "it should be distinctly announced to the world as our settled policy, that no future European colony or dominion shall, with our consent, be planted or established on any part of the North American continent." In one respect this was narrower than the Monroe Doctrine, since it did not include South America, but it was broader than the latter Doctrine in another respect, *viz.*, it prohibited the voluntary cession of American territory to any European power. We would not consent to such cession whether the territory in question was already under the control of some other European power or belonged to an independent American republic. A case of the latter sort was that of Yucatan, one of the provinces of Mexico, which, on account of an Indian insurrection, offered itself in turn to Spain, England, and the United States. With reference to the offer to the other powers, President Polk declared, in a message to Congress of April 29, 1848, that "according to our established policy, we could not consent to a transfer of this 'dominion and sovereignty' to either Spain, Great Britain, or any other European power." A bill was introduced in Congress enabling the President "to take temporary military occupation of Yucatan," but before anything could be done the collapse of the insurrection brought the incident to an end.

On behalf of Polk's position in this affair, it may be argued, as a general proposition, that what appears on its face to be a voluntary cession in the form of a treaty may, in reality, be forced. Again, even if truly voluntary, the transfer of territory from either an American republic or a weak European power to a strong European power, espe-

cially if the territory were near our border, might easily be dangerous to our peace and safety. An example of this was the transfer of the Louisiana Territory from Spain to France just prior to its acquisition by the United States. On the other hand, to prohibit a presumably independent American republic from voluntarily transferring a part of its territory to whomsoever it pleases is a denial of its sovereignty and, if enforced, would seem virtually to place such republic under the suzerainty of the United States.<sup>1</sup> Our Government, however, has never actually carried out this doctrine. On the other hand, we have ourselves annexed territory of independent American republics, as in the cases of Texas in 1845 and California and New Mexico in 1848. With reference to Texas, President Polk declared that "the people of this continent alone have the right to decide their own destiny," and that "should any portion of them, constituting an independent state, propose to unite themselves with our confederacy, this will be a question for them and us to determine without any foreign interposition." It appears, therefore, that the Polk Doctrine, which prevents voluntary cession to a European power, does not apply to the United States.

*The Cleveland Doctrine.* The interpretation and application of the Monroe Doctrine with which President Cleveland's name is associated was occasioned by a dispute between Venezuela and Great Britain in regard to the boundary line between the former and British Guiana. This dispute had dragged along for many years without attracting any popular interest or attention either in England or in the United States when, in 1895, it was suddenly brought

<sup>1</sup> In 1923, however, Secretary of State Hughes declared that "the Doctrine does not attempt to establish a protectorate over Latin-American states. The declaration against acquisition by non-American powers of American territory, even by transfer, might seem at first glance to furnish some basis for objection as an interference with the right of cession. But this objection disappears when we consider that the ground of the declaration by the United States is the recognized right which every state enjoys to object to acts done by other powers which threaten its own safety." *Am. Jour. Internat. Law* (October, 1923).

into the limelight by the determined stand which President Cleveland took that the dispute should be submitted to arbitration. In July of that year, his Secretary of State, Olney, sent a dispatch to London in which he argued that if, as Venezuela alleged, Great Britain was encroaching upon her territory under the guise of a boundary dispute, such aggression was an attempt to extend European power and control over American territory and was therefore clearly a violation of the Monroe Doctrine. He suggested that an investigation of the conflicting claims be made as the only way of determining whether Great Britain was within her rights or was seeking to extend her territory. He declared that Great Britain had thus far refused to arbitrate the controversy except on condition that Venezuela renounce a large part of her claim, and pointed out that the great disparity of strength between the two countries left Venezuela no hope of establishing her claim, in so far as it was just, except by peaceful means.

Some of the language used by Secretary Olney in this dispatch was very extreme and undiplomatic and apparently went beyond the necessities of the actual case. Thus, he declared that "three thousand miles of intervening ocean make any permanent political union between an European and an American state unnatural and inexpedient." This statement seems grotesque in view of the long-continued and mutually satisfactory connection between Canada and Great Britain. It might even be interpreted as a threat against the continued allegiance of Canada to Great Britain. It went beyond the Monroe Doctrine, which declared that with the existing dependencies of any European power we shall not interfere.

Again, Secretary Olney declared that "the states of America, South as well as North, by geographical proximity, by natural sympathy, by similarity of governmental constitutions, are friends and allies, commercially and politically, of the United States." This statement contains

several errors. In fact, the United States is more remote geographically from much of South America than it is from Western Europe. There is less natural sympathy between Latin America and the United States than between Latin America and the Latin nations of Europe. Although there may be a similarity in form between governmental institutions, the spirit in which they are operated, which is more essential, is frequently different.

Finally, Secretary Olney declared that "today the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition." The context seems to indicate that he intended to include in this sweeping statement not merely North America but both continents of the Western Hemisphere. The tone of this statement was blustering and imperialistic and entirely unsuited to a diplomatic note. It ignored British sovereignty in Canada and was calculated to give unnecessary offense not only to Great Britain but also to the Latin American countries whose sovereignty in their own domains it disregarded. This was an example of "shirt-sleeve diplomacy" at its worst.

In his reply to Secretary Olney's communication, Lord Salisbury argued temperately that the Monroe Doctrine was inapplicable since it was issued to meet a special situation which was quite different from that which now existed. He denied, moreover, that the Monroe Doctrine was a part of international law and declared that a third nation, such as the United States, had no right to intervene in the controversy and demand that it should be settled in a certain way, as by arbitration.

In the light of this reply, President Cleveland realized that he must now either recede from his position or be prepared to maintain it by force if necessary. He was fully determined to accept the latter alternative. Therefore, on December 17, 1895, he sent a message to Congress in which he declared that:



“If a European power by an extension of its boundaries takes possession of the territory of one of our neighboring republics against its will and in derogation of its rights, it is difficult to see why to that extent such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. This is the precise action which President Monroe declared to be ‘dangerous to our peace and safety,’ and it can make no difference whether the European system is extended by an advance of frontier or otherwise.”

The President then recommended that Congress make an appropriation to pay the expenses of a commission, to be appointed by himself, which should make an investigation for the purpose of determining the true boundary line between Venezuela and British Guiana. Finally, he declared that, when the report of the commission shall have been made and accepted, “it will, in my opinion, be the duty of the United States to resist by every means in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands or the exercise of governmental jurisdiction over any territory which after investigation we have determined of right belongs to Venezuela.”

This was, as President Cleveland realized, a virtual ultimatum or conditional declaration of war against Great Britain. There appeared to be many in Congress who were eager to engage in the unedifying pastime of “twisting the Lion’s tail.” That body, as well as the country generally, enthusiastically backed the President in his position, and the appropriation asked for was passed. There appeared now to be no way of avoiding war with Great Britain unless she submitted to the American demand for arbitration. This she did as gracefully as possible under the circumstances. The reason seems to have been that a revolt was brewing among the Boers in South Africa, with whom the German Kaiser apparently sympathized, and this situation

was likely to give Great Britain so much trouble that she did not care to be handicapped by having a war with the United States at the same time over what was, after all, a comparatively small matter.

President Cleveland's language implied a demand not only that the boundary controversy should be submitted to arbitration, but also that we ourselves should be the arbitrator. As it turned out, however, this was not the procedure actually followed. Before the commission appointed by the President had made its final report, Great Britain had come to an agreement with the United States whereby she undertook to make a treaty with Venezuela providing for the arbitration of the controversy. By the terms of this treaty, a special arbitral tribunal was to be appointed composed of two members chosen by the Supreme Court of the United States, and two members chosen by the British Supreme Court of Justice. The fifth member was to be selected by the four members thus chosen or, if they were unable to agree, by the King of Sweden and Norway. The tribunal thus constituted met in Paris and handed down a decision awarding to Great Britain the major portion of the disputed territory.

The part played by the United States in this affair appears to have been rather quixotic. Regarding the matter from a practical point of view, the preservation of peaceful relations and international commerce with Great Britain would seem to have been much more important to us than the question as to the ownership of a relatively small section of territory in South America. On the face of it, there seems little ground for supposing that the occupation of the disputed territory by Great Britain could really menace our safety or interests. Even supposing that such occupation were a violation of the Monroe Doctrine, which was doubtful, we were under no obligation even to protest against every such violation which might occur, much less to threaten to go to war in order to prevent it. Latin

American states have no right to demand of us protection in the name of the Monroe Doctrine, and we have always been at liberty to decline to grant such protection when we did not consider that the game was worth the candle. Looking at the matter from the standpoint of the preservation of democratic institutions, the extension of the influence of a government like that of Great Britain, which in spite of its monarchical form is democratic in spirit, seems to be no greater menace to this popular ideal than the retention of control by a so-called republic of Latin America whose government may in reality be a dictatorship. Moreover, the United States might be accused of inconsistency in objecting to the extension of British authority under the guise of a boundary dispute, since we did something very much like it at the time of our war with Mexico in 1846. However, as already pointed out, the Monroe Doctrine has not been interpreted by us as a self-denying ordinance which limits our own activities.

Nevertheless, aside from the intemperate and unnecessarily offensive language used by the responsible spokesman of our Government, the position which our Government took in the Venezuela boundary affair may be too severely criticized. Although we may have been hoodwinked by Venezuela into taking her side when she had no real case, our espousal of the rights of a small nation which we thought to be menaced by a powerful and aggressive nation tends to inspire the admiration of the disinterested spectator. It breathed something of the same spirit with which we espoused the rights of Belgium when attacked by Germany. Yet many of those who seem willing that the United States should intervene to protect the rights of small nations in Europe are opposed to our taking similar action in Latin America.

Again, it has been argued that the extension of British control over a few thousand squares miles of Orinoco swamps could not menace our safety, and that even if it

did, our demand that the controversy be arbitrated did not remove the menace, since the arbitration tribunal gave most of the disputed territory to Great Britain. This argument seems to miss the point entirely. The menace to us did not consist in the possession of this territory by Great Britain, but in her acquisition of it by unjust means. If the arbitration tribunal awarded it to her, then presumably it had been rightfully hers already; but this was the question to be determined. If it be asked how the acquisition of this small strip of territory could menace us, the answer is that, in and by itself, it did not. But, if a case of unjust acquisition were allowed by us to pass unnoticed, it would form a bad precedent, and there might be some plausibility in holding that our failure to protest would stop us from doing so when a similar but more important case of the same character should arise in the future.

As a matter of fact, another case of threatened aggression against Venezuela did occur shortly thereafter, when, in 1902, the European constable appeared in the form of naval vessels of Germany, England, and Italy for the purpose of bringing pressure upon Venezuela and securing the payment of certain claims which they had against her. In the previous year these powers had made diplomatic representations to Venezuela asking for a settlement, but the reply of the latter was that all claimants might have recourse to the ordinary courts of the country for the purpose of enforcing their claims. This would have been a sufficient remedy in countries having a trustworthy and independent judiciary, but the courts of Venezuela could scarcely be thus described. The three powers mentioned therefore resolved to establish a so-called pacific blockade of Venezuela's coast in order to bring her to terms. When, however, our Government refused to recognize the validity of a pacific blockade which adversely affected the rights of third parties, the powers decided upon a warlike blockade but without a formal declaration of war.

*The Roosevelt Doctrine.* Another and more effective means of coercion which the powers might have utilized against Venezuela was to land forces and seize her custom-houses. Such a move, however, would have been very likely to lead to territorial occupation of indefinite duration, and for this reason was opposed by the United States, as a violation of the Monroe Doctrine. President Roosevelt, in his message to Congress of December 3, 1901, declared that "we do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power."

When Germany, which was the leading spirit among the blockading powers, declined to agree, at President Roosevelt's suggestion, to arbitrate her claim, the President acted upon his theory that "the proper way of handling international relations is by speaking softly and carrying a big stick." The big stick in this case was Admiral Dewey and about fifty ships of the American navy which were ordered to be in instant readiness to proceed to the scene of operations. When Germany saw that the United States was determined to defend, by force if necessary, the Monroe Doctrine and the approaches to the Panama Canal in the Caribbean, she backed down and agreed to arbitration.<sup>1</sup> The question as to whether the blockading powers were entitled to preferential treatment over other powers which also had claims against Venezuela was submitted to the Hague Court of Arbitration, which decided in favor of the blockading powers. This decision may be criticized as offering an inducement to the powers to use force in the collection of claims.

In order to offset, if possible, the apparent intention of European powers to collect by force their claims against Latin American countries, a doctrine was advanced by two

<sup>1</sup> The account here followed is that of President Roosevelt himself. Doubt, however, has now been cast upon the correctness of this account by Mr. H. C. Hill. See his *Roosevelt and the Caribbean* (Chicago, 1927), 111, 123-137.

Argentine publicists, Calvo and Drago, which may be called a sort of Latin American Monroe Doctrine. Calvo held that it was not legitimate for a state to resort to intervention, for the purpose of collecting the private claims of its citizens against another state, at least before the claimant had resorted to the local courts for remedy. Drago added a corollary to this doctrine so as to prohibit armed intervention for the purpose of compelling the payment of a public debt. He held that when a capitalist lends money to a foreign state, he should assume the risk of repayment without expecting his government to back up his demand by force. He based his position upon the principle of the equality of states in international law. The substance of Drago's contention was agreed to by the majority of the powers represented at the Second Hague Conference of 1907 through the adoption of a resolution renouncing the use of armed force for the recovery of contract debts unless the debtor state should refuse arbitration.

The Calvo doctrine with the Drago corollary had a bearing upon the further development of President Roosevelt's interpretation of the Monroe Doctrine. Up to the time of the Venezuelan affair of 1902, our Government did not maintain that armed collection of debts contravened the Monroe Doctrine, in the absence of any occupation of territory. Roosevelt, however, at about that time came to be of the opinion that such armed intervention directed against a Latin American state would substantially involve a violation of the Monroe Doctrine, and consequently we could not permit European powers to exercise force in the collection of debts in Latin American countries. At the same time we could not deny that debts properly contracted ought to be paid. We could not allow such countries to hide behind us so as to avoid the discharge of their obligations. When a Latin American country owed a debt to European creditors which it refused to pay, we could not

afford to adopt the "dog-in-the-manger" attitude of forbidding the government of the European creditor from intervening in order to compel payment and at the same time refuse on our part to take any action looking towards the discharge by the debtor nation of its obligation. In the course of the diplomatic exchanges regarding the Venezuelan boundary dispute of 1895, Lord Salisbury had complained that while the United States undertook to protect Latin American republics from the consequences of their ill-behavior, we nevertheless assumed no positive responsibility with reference to such conduct. The cause of this complaint was now to be removed by President Roosevelt through the new and positive interpretation which he placed upon the Monroe Doctrine and the policy which, in accordance therewith, he adopted toward delinquent Latin American republics. This new policy and interpretation was announced in his annual message of 1904 to Congress in which he said:

"If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters; if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power. . . . It is a mere truism to say that every nation, whether in America or anywhere else, which desires to maintain its freedom, its independence, must ultimately realize that the right of such independence cannot be separated from the responsibility of making good use of it."

The construction thus placed by President Roosevelt upon the Monroe Doctrine transformed it from a negative into a positive doctrine. It came to be known as the policy

of the "big stick." The result of the policy thus announced was that the United States assumed the positive responsibility of maintaining stable conditions in otherwise turbulent or debt-ridden Latin American states so as to avoid any excuse for European intervention in violation of the Monroe Doctrine.

Shortly afterwards, in 1905, an opportunity presented itself of applying the Roosevelt Doctrine. Santo Domingo was badly in debt to certain European creditors and there was no prospect of early payment. The revenues, if properly administered, were sufficient to provide for the repayment of the debt within a reasonable time, but the tax receipts were being improvidently expended and the expense of collecting them was unduly great. The governments of the European creditors were losing patience and threatening to intervene. Under these circumstances President Roosevelt entered into an executive agreement with Santo Domingo under which supervision of that country's finances was to be placed in the hands of the United States. It was provided that the United States should appoint a receiver-general of customs, who, under our protection, should collect the custom revenues and apply them to the payment of Santo Domingo's foreign and domestic debts. This was done, with the result that the danger of European intervention was obviated.

The policy thus inaugurated by President Roosevelt has been extended to other countries in the Caribbean region, including Haiti and Nicaragua, and includes not only financial but also police supervision. It has come to be one of the most prominent and important features of our Latin American policy. It may be criticized on account of its palpably imperialistic possibilities, but we have undertaken to regularize and legalize this movement through the making of treaties with the countries in question, recognizing our right of intervention. This development or extension of the Monroe Doctrine, however, is a recogni-



tion on our part that the Doctrine implies the existence not only of rights but also of unavoidable duties owed by us both to our neighbors to the South and to European creditor nations. Although it embodies a potential American dictatorship in Latin America, it should rather be regarded as a trusteeship of the United States towards the backward countries of the Caribbean region. So long as it merely protects small debt-ridden Latin American nations from European intervention and aggression, it arouses little protest. We lay ourselves open to criticism, however, when, under the excuse of preventing European aggression, we ourselves embark on a program of financial imperialism or selfish aggrandizement.

While containing elements of danger the Roosevelt corollary seems, on the whole, to be a logical extension of the Monroe Doctrine. As former Secretary of State Hughes has declared, in reference to the Caribbean Sea region, if we had no Monroe Doctrine, we should have to create one. New occasions, as he points out, require new applications of an old principle.<sup>1</sup>

*Taft and the Doctrine.* President Taft inherited the Roosevelt principles. He endorsed the latter's positive interpretation of the Monroe Doctrine, and applied it to new situations arising in the Caribbean region. He summed up as follows the doctrine underlying American intervention in that region:

“Now, when we properly may, with the consent of those in authority in such governments and without too much sacrifice on our part, aid those governments in bringing about stability and law and order, without involving ourselves in their civil wars, it is a proper national policy for us to do so. It is not only proper national policy but it is international philanthropy. We owe as much as the fortunate man owes aid to the unfortunate in the same neighborhood and in the same community. We are international

<sup>1</sup> *Am. Jour. of Internat. Law*, XVII, 611 ff. (October, 1923).

trustees of the prosperity we have and the power we enjoy, and we are in duty bound to use them when it is both convenient and proper to help our neighbors. When this help prevents the happening of events that may prove to be an acute violation of the Monroe Doctrine by European governments, our duty in this regard is only increased and amplified."

While President Taft's words breathed brotherly love, his Secretary of State, Philander C. Knox, a skilled corporation lawyer and closely associated with capitalists, was engaged primarily in the promotion of American financial and business interests in Latin America as well as in other parts of the world. "Dollar diplomacy" flourished under his management of our foreign relations. The attitude of the State Department seems to have been expressed by Mr. Huntington Wilson, Assistant Secretary of State in the Taft administration, who complained of the "great pertinacity" with which certain European powers have "poached upon our preserves in the Caribbean and even on the Isthmus itself."<sup>1</sup> Carrying out the metaphor, President Lowell of Harvard has referred to the interpretation of the Monroe Doctrine, "rarely asserted, often repudiated but nevertheless widely entertained, that Central and South American States are a game preserve from which poachers are excluded but where the proprietor may hunt as he pleases. Naturally the proprietor is anxious not only to keep away the poachers but to oppose game laws that would interfere with his sport."<sup>2</sup> The Government in its official utterances, however, has of course not gone as far as President Lowell intimates.

*The Magdalena Bay Resolution.* Although the Monroe Doctrine was originally a purely executive pronouncement, it has received the support of both branches of Congress. Such support was impliedly given by Congress when in

<sup>1</sup> Quoted by Q. Wright, in *Proceedings of Am. Soc. of Internat. Law*, p. 66 (April, 1924).

<sup>2</sup> *Ibid.*

1896, at the suggestion of President Cleveland, it passed a bill appropriating funds to pay the expenses of a commission to investigate and report in the matter of the Venezuela-British Guiana boundary line. The Senate also gave its support to the Doctrine when it attached reservations to the resolutions of ratification of the conventions adopted at the Hague Conferences of 1899 and 1907 and the Algeciras Conference of 1906 reciting that our participation in such conferences was not to be construed as a departure from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope nor as a relinquishment by the United States of its traditional attitude toward purely American questions.

In adopting these reservations the Senate merely followed the well-known traditional policy. In 1912, however, under the lead of Senator Lodge, chairman of the committee on foreign relations, it assumed the initiative in adopting a new interpretation of the Monroe Doctrine. The new policy was embodied in a simple Senate resolution and did not receive the formal support of the Taft administration. The resolution as passed by the Senate asserted that:

“When any harbor or other place in the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes.”

The passage of the resolution seems to have been due to newspaper reports that a Japanese corporation was attempting to secure control of land on Magdalena Bay in

Lower California, Mexico. Although these reports probably had little foundation in fact, the resolution itself contains interesting implications. In two respects it differed from previous interpretations or extensions of the Monroe Doctrine. In the first place, the Doctrine was now for the first time applied to an Asiatic nation. The Doctrine as originally stated by Monroe had reference merely to the possible encroachment of European powers in the Americas. There was no thought at the time of the possibility of encroachment by Asiatic powers. The spectacular rise of Japan, however, to the position of a world power caused its advance to be regarded with uneasiness in some quarters. This advance, together with the alliance with Great Britain formed in 1902, led certain of our more nationalistic statesmen to feel that, for purposes of protecting the Monroe Doctrine, Japan must be grouped with the European powers. Broadly construed, the Doctrine might be interpreted as implying an antinomy not merely between Europe and America but between the Eastern and Western Hemispheres. From this point of view Japan would be included among the powers against which the Doctrine was directed. This position, however, was greatly weakened by the fact that, through the cession of the Philippine Islands in 1898, the United States had acquired territory in the Eastern Hemisphere. How could the United States consistently object to the rumored colonization by Japan in Mexico when we ourselves had acquired territory in Asiatic waters so near to her own shores? Indeed, it may be suggested that Japan would have had as much right to formulate a sort of Monroe Doctrine of her own objecting to our acquisition of the Philippine archipelago, or to its transfer from Spain to the United States. In this respect we are forced to deny that consistency is a virtue of the highest importance.

In the second place, the Magdalena Bay Resolution differed from previous interpretations of the Monroe Doc-

trine in extending it to a "corporation or association" under the practical control of a non-American government, rather than to the government itself. This seems to be a logical extension where, as in this case, it is thought that the corporation is a mere disguise or subterfuge and is really acting on behalf of the foreign government. The Doctrine is thus interpreted as preventing such a government from doing indirectly what it could not do directly without violating it. In this respect the Magdalena Bay Resolution is in line with several other recent pronouncements which construe the Doctrine as prohibiting indirect encroachments of a political, or even economic, character by non-American governments in Latin America. When the Doctrine was originally issued, practically the only way in which a European power could gain occupied territory was to take it by force of arms. In recent decades more refined methods of exploitation have been developed. The extension of the Doctrine to indirect encroachment is merely a recognition of this fact.

*Wilson and the Doctrine.* The name of President Wilson is associated with certain noteworthy developments or extensions of the Monroe Doctrine. He continued in full vigor the positive or "big-stick" interpretation of the Doctrine as applied by President Roosevelt to debt-ridden countries of the Caribbean region. He also strongly endorsed the application of the Doctrine to indirect encroachments, even when of an apparently mere economic nature. When, early in his administration, it appeared that an English company was about to arrange for a monopolistic oil concession in Colombia, he made a public statement in which he said:

"You hear of 'concessions' to foreign capitalists in Latin-America. You do not hear of concessions to foreign capitalists in the United States. They are not granted concessions. They are invited to make investments. The work is ours, though they are welcome to invest in it . . . States

that are obliged, because their territory does not lie within the main field of modern enterprise and action, to grant concessions are in this condition, that foreign interests are apt to dominate their domestic affairs . . . What these states are going to seek, therefore, is an emancipation from the subordination, which has been inevitable, to foreign enterprise . . . The Latin-American states . . . have had harder bargains driven with them in the matter of loans than any other people in the world. Interest has been exacted of them that was not exacted of anybody else, because the risk was said to be greater, and then securities were taken that destroyed the risks . . . I rejoice in nothing so much as the prospect that they will now be emancipated from these conditions, and we ought to be the first to take part in assisting in that emancipation."

Wilson was not opposed to legitimate investments by European capitalists in Latin America, but he did take a determined stand against such investments or concessions as would be likely to carry with them political control of the government. This seemed likely when the concession or franchise was of such an extensive character as would readily give rise to claims which the concessionaire's government might be called upon to support. It was not the mere entrance of European capital to which he was opposed, but rather the intervention of European governments ostensibly to support the claims of their capitalists but involving possibilities of political control in violation of the Monroe Doctrine. It was doubtless with this idea in mind that, in 1919, he defined the Doctrine as meaning "that no nation shall come to the Western Hemisphere and try to establish its power or interfere with the self-government of the people of this Hemisphere; that no power shall extend its governing and controlling influence *in any form* to either of the Americas."<sup>1</sup> He thus endorsed that interpretation of the Monroe Doctrine which applies it to indi-

<sup>1</sup> Address at Portland, Oregon, September 25, 1919. Italics are the author's.

rect encroachments of non-American powers in Latin America.

President Wilson's policy of opposition to Latin American economic concessions to European capitalists was open to misconstruction. The countries not only of the Caribbean region but also of South America are largely dependent upon outside capital for the development of their enormous natural resources. For this capital they must look either to Europe or to the United States. In view of the unstable conditions in many of the Latin American countries, European capitalists would ordinarily hesitate to invest large amounts in those countries unless assured of their government's support. The enforcement of Wilson's doctrine would have the effect very largely of cutting off the flow of European capital to the less stable countries of Latin America, with the result that those countries would be able to secure the needed capital only in the United States. \ Wilson's doctrine, therefore, while on its face a pronouncement for the benefit of the Latin American countries and for their protection against foreign exploitation, might be construed as intended to inure to the benefit of American capitalists, who, under it, would have a free hand in exploiting Latin American resources. \ Wilson was doubtless too much of an idealist to have intended this construction, but in less scrupulous hands it might easily be twisted into a doctrine of financial imperialism, and this possibility did not escape the attention of publicists in Latin American countries. This explains in part why there is a tendency in those countries to distrust the Monroe Doctrine.

After the World War broke out, President Wilson's attention was diverted from Latin America to the problem of formulating the bases of a durable peace. The central feature of his plan was the Covenant of the League of Nations, Article X of which provides that "the members of the League undertake to respect and preserve as against

external aggression the territorial integrity and existing political independence of all members of the League." This provision embodied the idea which President Wilson had put forth in his address to the Senate of January 22, 1917, in which he proposed that "the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world; that no nation should seek to extend its policy over any other nation or people, but that every people should be left free to determine its own policy, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful."

Article X on its face went further than the Monroe Doctrine, not only in extending it to members of a world league, but also in embodying a formal mutual guarantee of independence. As already indicated, the Monroe Doctrine was not intended to guarantee the safety of Latin America, except incidentally as such safety might be involved with that of the United States. The proposal to extend the Monroe Doctrine to the world met opposition in the United States on the ground that, if the United States joined the League, it would involve us in assisting to maintain the boundary lines of European nations. In order to overcome opposition in the United States and secure our adherence to the League, Article XXI was inserted which provides that "nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace." This provision, however, was objected to by opponents of the League in the United States on the ground that the Monroe Doctrine is a unilateral policy resting solely on our own support, and is not an understanding of any sort. The Senate took substantially this view when, in November, 1919, it adopted a reservation to the Treaty of Versailles providing that the Monroe Doctrine "is to be interpreted by the United States alone."



*Hughes and the Doctrine.* The period from 1921 to 1925 during which Mr. Charles E. Hughes was Secretary of State was one of reaction from the World War and of the resurgence of a strong nationalistic spirit. This naturally had an effect upon the interpretation of the Monroe Doctrine. It cut short two tendencies which had manifested themselves prior to the War, *viz.*, to regard the Doctrine as obsolete and to suggest that it should rest upon the co-operative support of the leading American republics. The tendency after the War was not only to deny that the Doctrine was obsolete but to reassert it with increased vigor. Of course, it must be admitted that the danger of that kind of European encroachment against which the Doctrine was originally aimed no longer exists; and if the Doctrine is to be confined to that precise situation, it would now have to be regarded as substantially obsolete. But, as we have seen, the Doctrine has developed so as to meet new situations, such as encroachment in indirect forms and from any non-American power. Thus, Secretary Hughes has declared that the Doctrine "is opposed (1) to any non-American action encroaching upon the political independence of American states under any guise, and (2) to the acquisition in any manner of the control of additional territory in this hemisphere by any non-American power."<sup>1</sup>

Prior to the World War, various suggestions were made that the Monroe Doctrine should be placed upon a Pan-American basis, that at least the "A B C" countries—Argentina, Brazil, and Chile—should be invited to coöperate with the United States in maintaining it. Thus, former President Roosevelt declared in 1913 that "all the nations which are sufficiently advanced, such as Brazil and the United States, should participate on an absolute equality in the responsibilities and development of this doctrine so far as the interests of the Western Hemisphere

<sup>1</sup> *Am. Jour. of Internat. Law*, XVII, 611 ff. (October, 1923).

as a whole are concerned. It must be made a continental and not a unilateral doctrine." The contrary view, however, has been taken by most of our statesmen, including Root, Hughes, and even Wilson on one occasion.<sup>1</sup> If the Doctrine were primarily altruistic in character, it would be logical that it should be continentalized. But since it is intended mainly and primarily for our own self-protection, if not self-preservation, it cannot be logically changed into a policy resting for its enforcement upon the common consent and action of the various American states. As Secretary Hughes has suggested, however, there is no reason why every one of the other American states should not formulate a similar principle as a part of its own foreign policy.

As already pointed out, a provision safeguarding the Monroe Doctrine was inserted in the Covenant of the League of Nations. When the Latin American states were considering the question of joining the League, a demand arose among them that the Monroe Doctrine should be defined, in order that they might know to what they were committing themselves. Our Government, however, has not undertaken to define it, because a definition, even if possible, would tend to crystallize the Doctrine into its present mold and render it less capable of expansion and development so as to meet new conditions as they arise. If it were incapable of further growth it would probably within a few years or decades become substantially obsolete.

In 1923, on the occasion of the celebration of the one hundredth anniversary of the issuance of the Doctrine, Secretary Hughes made two notable addresses. Regarding the question of defining the Doctrine, he observed that "as the policy embodied in the Doctrine is distinctively the policy of the United States, the United States reserves to

<sup>1</sup>In 1916 Wilson said: "The Doctrine was proclaimed by the United States on her own authority. It always has been maintained, and always will be maintained, upon her own responsibility."

itself its definition, interpretation, and application.” “The United States,” he added, “has not been disposed to enter into engagements to submit to any other power or concert of powers the determination either of the occasions upon which the principles of the Doctrine shall be invoked or of the measures that shall be taken in giving it effect.”<sup>1</sup>

Secretary Hughes, however, realized the need of allaying the fears and resentment of the South American republics regarding the Doctrine. He was aware of the feeling among them that it was presumptuous on the part of the United States to assume to protect them from a danger that did not exist, or, as it was expressed, they did not need to have an umbrella held over them when it was not raining. While distinguishing between our Caribbean policy and the Monroe Doctrine, he maintained that the latter is not a policy of aggression, but a policy of self-defense. He further asserted that it does not infringe upon the independence or sovereignty of other American states. Moreover, he declared that the Doctrine does not stand in the way of Pan-American coöperation, but rather affords the necessary foundation for that coöperation in the independence and security of American states. He carried out this idea still further in his statement that the Doctrine is not an obstacle to a wider international coöperation, beyond the limits of Pan-American aims and interests, whenever that coöperation is congenial to American institutions. In summing up, he declared that our attitude is one, not of isolation, but of independence.

#### THE REVISION OF THE MONROE DOCTRINE

The statement of Secretary of State Hughes in 1923 that the Monroe Doctrine is not a policy of aggression, but one of self-defense, marks a turning point in the development of the Doctrine. It indicated a desire on the part of our

<sup>1</sup> *Am. Jour. of Internat. Law*, XVII, 611-628 (October, 1923).

Government to trim off the excrescence of the Roosevelt Corollary so as to make the Doctrine more palatable to our Latin-American neighbors. This desire was made clearer by later developments, among which may be listed the following: the J. Reuben Clark Memorandum, the report of the Senate Committee on Foreign Relations on the Pact of Paris, the attitude of our Government toward the Chaco and Leticia affairs, and the statement of President Franklin Roosevelt in December, 1933.

The Clark Memorandum was prepared for the State Department in 1928 by its undersecretary and issued under the imprimatur of the Department in 1930. It goes into a historical review of the Monroe Doctrine in order to show that the Roosevelt Corollary was not a legitimate part of it. The Memorandum further declares that the Doctrine was meant to apply solely to relationships between European and American governments and that it "lays down no principles to govern the inter-relationships of the states of the Western Hemisphere as among themselves." In other words, "the Doctrine states a case of the United States versus Europe, and not of the United States versus Latin America."

Early in 1929 the United States Senate gave its approval to the Pact of Paris for the Renunciation of War following the presentation of a report from the Senate Committee on Foreign Relations. In view of the fact that the Pact did not abolish wars of defense, the Committee pointed out that "the United States regards the Monroe Doctrine as a part of its national security and defense." As thus narrowly construed, the Doctrine was not incompatible with the Pact.

In the cases of the Chaco dispute between Bolivia and Paraguay and the Leticia dispute between Peru and Colombia, the League of Nations intervened for the purpose of settling these disputes without objection on the part of the United States. Our Government thus indicated

its understanding that there was no conflict between such intervention and our revised conception of the Monroe Doctrine.

Finally, in December, 1933, President Franklin Roosevelt declared that the United States is opposed to armed intervention in Latin America. He further declared that if it should become necessary to intervene in Latin America for the maintenance of constitutional government, that would be not an obligation of the United States alone, but it would be the joint concern of the whole continent. Thus, instead of assuming the rôle of dictator in this hemisphere, the President looked toward the Pan-American ideal of a partnership or multilateral policy in the maintenance of stable conditions throughout the Americas. He substituted the policy of the Soft Word for Theodore Roosevelt's policy of the Big Stick. The Monroe Doctrine was thus continentalized and the peace of America was made the collective concern of all the American republics. This position was definitely confirmed by a convention adopted at the Inter-American Conference for the Maintenance of Peace, held in 1936 at Buenos Aires.

#### THE CARIBBEAN DOCTRINE

The recent extensions of the Doctrine may be regarded as corollaries therefrom or as distinct doctrines. This is not a matter of fundamental importance, but is rather one of language and definition. Secretary Hughes was of opinion that we have a Caribbean policy which, while including the Monroe Doctrine, goes beyond it and may be regarded as a distinct policy. The Monroe Doctrine, while potentially applying to the whole of Latin America, has not in fact been applied within recent years to the more stable and powerful nations of South America. Its principal application during the twentieth century has been in the Caribbean region, where the governments are weak and

unstable, and where the United States has special interests on account of the Panama Canal and our proximity to that region. Such control as we exercise over the people of that region is primarily intended to guard them and our own interests from the possible menace of intervention by a non-American power.

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## CHAPTER IV

### THE UNITED STATES AND THE CARIBBEAN AREA

LATIN America is one of the three main regions of the world with which the United States has important relations. Of the countries of Latin America, a clear distinction may be made between those situated on the continent of South America on the one hand and those of Central America and the West Indies on the other. With the latter group of countries, including especially Cuba, Mexico, Nicaragua, and Panama, our relations have been particularly important because of their greater proximity to the United States and because of our interest in the protection of the canal route. The investments and other economic interests of the United States in the latter group of countries are also very considerable. These countries are for the most part too weak to make any effective resistance to American encroachments and our enormous economic stake in this region causes much pressure to be brought to bear upon our Government to pursue an active policy there in promoting and protecting such economic interests.

#### CUBA <sup>1</sup>

Our relations with Cuba are most important because of (1) its geographical proximity; (2) the volume of commerce which we have with the island—greater than that with any other Latin-American country; (3) our investments in the island, which have been estimated at one and

<sup>1</sup> Reprinted by permission from the author's article, "Roosevelt's Latin-American Policy," *American Political Science Review*, XXIX, 5, October, 1935, pp. 805-820.

a half billion dollars—more than in any other foreign country except Canada; (4) the special part played by the United States in securing the independence of the island from Spain.

At the outbreak of the Spanish-American War in 1898, Congress passed a self-denying ordinance, disclaiming any intention on our part to retain control over the island, but rather to leave control to the Cuban people. This was done; but there was a string tied to our relinquishment of control. This string was the Platt Amendment of 1901, attached as a rider to a Congressional appropriation act. Its most important provisions were:

(1) The government of Cuba shall never enter into any treaty with any foreign power which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power to obtain by colonization or for military or naval purposes, or otherwise, lodgment in or control over any portion of said island.

(2) Said government shall not assume or contract any public debt to pay the interest upon which, and to make reasonable sinking-fund provision for the discharge of which, the ordinary revenues of the island, after defraying the current expenses of the government, shall be inadequate.

(3) The government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

(4) To enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

(5) By way of further assurance, the government of



Cuba will embody the foregoing provisions in a permanent treaty with the United States.

Cuba was required also to embody the provisions of the Platt Amendment in her own constitution. There was considerable opposition in the island to the Amendment, but this was somewhat mollified by the Root interpretation to the effect that these requirements were intended to be helpful to Cuba.

The most important provision of the Platt Amendment was that which gave us the right of intervention. We exercised this right of intervention and governed Cuba from 1906 to 1909. On several other occasions we have sent warships to Cuban waters and have threatened to intervene.

In the summer of 1933, in view of disorders in Cuba, President Roosevelt, after conferring with Latin-American diplomatic representatives in Washington, dispatched several warships to Cuban waters as a precautionary step. Strict orders were given, however, that no marines should be landed except in the gravest emergency, for the purpose of protecting American lives. The President announced that no intervention was intended under the Platt Amendment, nor any interference with the internal affairs of Cuba. In fact, no marines were landed.

Our desire was that Cuba should work out her own salvation without interference from us. This was indicated by Secretary Hull's statement of September 11, 1933, in which he declared:

"The chief concern of the government of the United States is, as it has been, that Cuba solve her own political problems in accordance with the desires of the Cuban people themselves. The United States has no interest in behalf of, or prejudice against, any political group or independent organization which is today active in the political life of Cuba. In view of its deep and abiding interest in the welfare of the Cuban people, and the security of the republic of Cuba, our government is prepared to welcome

any government representing the will of the people of the republic and capable of maintaining law and order throughout the island. Such a government would be competent to carry out the functions and obligations incumbent upon any stable government."

In view of the possible effect of the Cuban situation upon our relations to other Latin-American governments, President Roosevelt invited the diplomatic representatives of Argentina, Brazil, Chile, and Mexico to the White House and informed them that the United States had no desire to intervene in Cuba and was seeking every means to avoid intervention. He declared that the keynote of our policy was that the Cuban people should quickly obtain a government of their own choosing and one able to maintain order. The Argentine government expressed its gratification at the position of the United States and sent a note to Secretary Hull extending "its most cordial felicitations for his attitude regarding the reform of the Platt Amendment, which justifies the opinion which we formed at Montevideo that the policy of the government of President Roosevelt would mark a transcendental era in the development of closer relations and in the moral prestige of the United States with the whole of America."

The Roosevelt Administration realized that Cuba's difficulties were partly political but mainly economic, due to low prices for sugar, its principal crop, and to heavy foreign debt charges. The Administration indicated that as soon as a stable government should be established in Cuba representing the will of the Cuban people, we would promptly recognize it, and that we should then be prepared to adopt two important measures: (1) the abrogation of the Platt Amendment, and (2) extension of aid to bring about Cuban economic rehabilitation.

Early in 1934, the United States recognized the Carlos Mendieta government in Cuba, and the time seemed ripe for carrying out the promised measures. In May of that

year, a new treaty of relations between the United States and Cuba was signed and promptly ratified. It provided for the abrogation of the Platt Amendment, except that the United States retains the naval base at Guantánamo. We thus renounced the specific right of intervention given us by treaty. Since then we have no right of intervention except that in accordance with the rules of international law.

We recognize that the abrogation of the Platt Amendment, although a large step in advance, is not a panacea for Cuba's ills. Disorders are still likely to break out from time to time during the long process while Cuba is acquiring the difficult art of self-government. But the position of the United States government is clear. It will not intervene unless a condition of virtual anarchy or chaos develops.

The Roosevelt Administration next turned toward giving Cuba aid in working out her economic rehabilitation. In March, 1934, the Second Export-Import Bank was established in order to facilitate trade with Cuba and to extend credit to her. We realize that Cuba's economic welfare depends largely on her ability to sell sugar to the United States at a reasonable price. But under the Smoot-Hawley tariff act of 1930 a duty of two cents a pound was levied on Cuban sugar, with the result that Cuba was able to compete effectively neither with domestic producers in the United States nor with sugar produced in our insular possessions—Porto Rico, Hawaii, and the Philippines—which comes into the United States free of duty.

Therefore, on President Roosevelt's recommendation, Congress passed in May, 1934, the Jones-Costigan Act limiting the domestic production of sugar and limiting imports of sugar into the United States. Under the authority of this act, the Secretary of Agriculture assigned quotas to Cuba, to our domestic producers, and to the several insular possessions of the United States. The quota

assigned to Cuba was 300,000 tons more than she had exported to the United States during 1933. At the same time, President Roosevelt, acting under the flexible provisions of the tariff act of 1930, reduced the import duty on Cuban sugar from two cents to one and a half cents a pound. Finally, under the Reciprocal Trade Agreements Act passed by Congress in June, 1934, our government negotiated a trade agreement with Cuba which reduced the import duty on Cuba's sugar still further to nine-tenths of a cent a pound.

These steps saved the Cuban sugar industry from ruin. In return, Cuba reduced her import duties on various American products, such as automobiles and lard. By means of these measures, the volume of trade between the United States and Cuba has been considerably increased.

#### MEXICO <sup>1</sup>

On account of Mexico's proximity along our southern border, the relations between the United States and that country have always been of special importance. After the loss of her territory as the result of the War of 1846 and the Gadsden Purchase, which was probably not altogether a voluntary cession, the relations between the two countries were strained. The United States, however, incidentally did Mexico a good turn by helping to loosen the hold of Maximilian of Austria upon her, even though our main object was self-protection and the vindication of the Monroe Doctrine. Other grounds of the special interest of the United States in Mexico are the large number of American citizens who are resident there, and the predominance of American capital invested.

During a large part of its history the curse of Mexico has been lack of stability on the part of its Government. This

<sup>1</sup> Although not geographically a part of the Caribbean area, Mexico may for practical reasons be classified with the Caribbean countries.

instability has without a doubt been the result in part of the heterogeneous character of the Mexican population. Of this population the principal racial elements are the Spaniards and the Indians, but in addition to these there are the half-breeds who outnumber by far either of the other two groups. From 1876 to 1911, however, Mexico enjoyed the rare blessings of a stable Government. At least, it gave the impression of stability. During nearly the whole of this period Porfirio Diaz, a pure-blooded Indian, was President of Mexico. He ruled the country with a strong arm, organized rural police forces, and made consistent and effective efforts to suppress the prevalent banditry and all attempts at insurrection against his régime.

"If we could leave the Diaz régime with a mere statement of the many material benefits which it conferred upon Mexico, Porfirio Diaz would rank as one of the world's great statesmen. But, unfortunately, there is a reverse side to the picture. A scientific form of government which functioned very effectively, which kept peace at home and friendship abroad, had been established, but almost wholly in the interest of the *Científicos* who controlled it. The financiers, the large land-owners, and the government officials found the system most satisfactory. But how did it meet the needs of the great mass of Indians who constituted about three fourths of the population? It must be conceded that it did nothing for the peon except to exploit him. The land was held in great estates, some containing as high as half a million acres. There the peon and his family had to live in a condition bordering upon slavery; there he must give his service to the farmer at a starvation wage, and often take out all his pay in trade at the *hacienda*, or plantation store."<sup>1</sup>

One of the outstanding factors affecting the foreign rela-

<sup>1</sup>G. H. Stuart, *Latin America and the United States*, p. 106.

tions of Mexico is the existence in that country of extraordinary natural resources, coupled with the lack of native capital to develop them. Formerly, Mexico's silver mines were among the richest in the world. Now, she is one of the principal sources of the world's supply of oil. Diaz recognized the need of foreign capital to develop these resources and to build railroads, and encouraged it to come in. This it did, with some hesitation. It was natural that much of the foreign capital invested in Mexico should come from the United States. This gave us an economic stake in Mexico, the protection of which might bring about intervention of one sort or another in case the conditions of stability failed to continue.

Foreign investors had been lulled into a sense of security by the apparent stability of the Diaz régime. They were destined to receive a rude awakening. One of the principal defects of the Diaz administration was the land system. The rich land-owners held vast estates, while the masses of people were reduced to a state of peonage. General dissatisfaction increased, and in 1911 a formidable insurrection under Madero forced Diaz to resign and Madero was elected President. He was too weak, however, to keep under control the various contending elements in the country. General Huerta, commander of the government forces, turned against him. Early in 1913 a provisional government, with Huerta at its head, was established, and shortly afterwards Madero was assassinated.

Thus matters stood when Woodrow Wilson became President of the United States in March, 1913. Various European governments quickly extended recognition to the Government of Huerta and our ambassador at Mexico City also urged our Government to do so. President Wilson, however, declined to take this step. Grave suspicion was felt that Huerta was responsible for Madero's death, and President Wilson refused to recognize a government based on violence and assassination, rather than in accordance with

the regular constitutional methods of presidential succession. He intimated, however, that he might recognize a president chosen at a fair and free election, provided Huerta should not be a candidate. Naturally the Huerta Government spurned this suggestion.

President Wilson's desire to eliminate Huerta as a candidate was due to the fact that, through his control of the military forces, Huerta could easily secure his own election even though the majority of the voters were opposed to him. Under the circumstances, a fair and free election was a virtual impossibility. Wilson's refusal to extend at least *de facto* recognition to the Huerta Government was a departure from our previous recognition policy. Since the time of Jefferson it had been our settled policy to recognize new governments as soon as they gave evidence of stability, without regard to the revolutionary character of their origin. Since the origin of our own Government had been revolutionary, we could hardly have adopted with consistency a different policy during our early history. After we had become a comparatively mature nation, however, other considerations might justify a change in this policy. A settled policy on our part to refuse to recognize governments established as the result of violence and bloodshed, especially in Latin America, might tend to discourage revolution in that region. In view of the large amount of American capital invested in Mexico, it would be to our interest to discourage revolution. In carrying out such a policy, however, difficulties would undoubtedly be encountered.

In demanding the complete elimination of Huerta, President Wilson probably made a mistake. Since Huerta no longer had anything to gain by pursuing a conciliatory policy toward us, he lost little time in showing his displeasure. This was indicated by the Vera Cruz incident in April, 1914. Some of our sailors, while ashore in uniform, were arrested and thrown in jail. They were later released, with expressions of regret, but Huerta refused to comply with our de-

mand for an apology in the form of a salute to the flag of the United States. A German vessel was about to land a cargo of arms and, in order to prevent this, we seized the port and custom-house at Vera Cruz. This step might easily have led to intervention on a much larger scale, but fortunately this was avoided. The "A B C" powers of South America—Argentina, Brazil, and Chile—offered to mediate between the two countries. Their offer was accepted and a conference was held at Niagara Falls. It did not accomplish much, but, shortly after it adjourned, Huerta, weakened by his failure to be recognized by the United States, worried by his inability to secure arms or credit from abroad, and harassed by the inroads of the rebel chieftains, Carranza and Villa, resigned and fled the country.

Then followed a period of confusion during which various rival chieftains attempted to secure control of the government. Of these, Carranza and Villa were the most prominent. The constant fighting, disorder, and insecurity left the country in a prostrate condition. Naturally, American property interests suffered, and an insistent demand was heard in the United States for intervention by our Government. Nevertheless, President Wilson continued to follow his announced policy of "watchful waiting." In October, 1915, after securing from Carranza promises of the protection of American lives and property, his Government was recognized as the *de facto* Government of Mexico.

The recognition of Carranza aroused bitter hostility on the part of Villa against the United States. Early in 1916 he started on the warpath. A number of Americans holding passports of safe-conduct issued by the Carranza Government were seized and shot. Not content with this outrage, he made a raid across the border, committing depredations in Columbus, New Mexico. An American force, under General Pershing, was sent in pursuit, and followed the bandits well into Mexican territory. It was the duty of the Car-



ranza Government, in the first place, to capture and punish the perpetrators of these outrages. Its failure to do so made it necessary for the United States to take the action which it did. Nevertheless, not only did the Carranza Government fail to coöperate with the United States troops in bringing Villa and his bandits to justice, but put obstacles in the way of their further penetration into Mexico. President Wilson's patience was at last exhausted. He mobilized a stronger force along the border. War seemed almost inevitable, but Carranza realized that he could no longer safely maintain his intransigent attitude. He released American soldiers who had been captured, and agreed to send delegates to a joint conference which was held at New London in the fall of 1916 for the purpose of discussing the situation, and, if possible, effecting a settlement.

Although the conference did not accomplish as much as had been hoped, it nevertheless brought the relations between the two countries out of the realm of force into that of negotiation. American troops were shortly afterwards withdrawn from Mexico. Early in 1917 the United States established diplomatic relations with the Carranza Government and recognized it as the *de jure* Government of Mexico. President Wilson's desire to avoid an actual war with Mexico was fulfilled. His policy of "watchful waiting" was vindicated, and its wisdom demonstrated in the light of the need which now arose for American participation in the World War.

In 1917, Mexico adopted a new constitution which, among other things, prohibited a second term for the President. As his first term approached its end, Carranza attempted to avoid the effect of this provision by securing the election of some one who would be subservient to him. In order to thwart this plan, a revolt was organized under General Obregon which proved successful. In the confusion Carranza was assassinated, and in the fall of 1920, Obregon was elected President. The Wilson administration was

then drawing to a close, and the question of the recognition of the Obregon Government was left for the incoming Harding administration to decide.

The most important question which has affected the relations between the United States and Mexico during recent years has been the interpretation and application of Article 27 of the Mexican Constitution of 1917. The general purpose of this article was the nationalization of the subsoil mineral and oil deposits. American oil interests were affected by this article and by executive decrees issued under it. They denounced it as confiscatory, especially if allowed to have a retroactive effect upon land and mineral rights previously acquired by American corporations. Our Government protested against the policy apparently involved in so far as it affected our interests, but was able to secure little satisfaction from Carranza. At the beginning of the Harding administration, President Obregon seemed firmly established in Mexico, but our Government declined to recognize him until his Government gave adequate assurances that American property rights in Mexico should be protected against confiscation.

In decisions handed down by the Supreme Court of Mexico, Article 27 had been declared non-retroactive. Our Government, however, did not deem this to be a sufficient assurance or protection for our property interests. Secretary Hughes, on behalf of our Government, stated that the decisions did not effectively protect the rights of American citizens "where lands were owned prior to May 1, 1917, but had not been developed." In the summer of 1923, American and Mexican commissioners met in Mexico City to discuss the question in controversy between the two countries. On behalf of Mexico it was argued that she was within her rights in enacting laws under the police power to protect the interests of the nation in her natural resources, even though private rights might be to some extent curtailed. When the United States adopted the policy of prohibition, would the

Mexican owner of a brewery in the United States be entitled to demand that the law should not apply to his property? When the United States abolished slavery, were the foreign owners of slaves in the United States excepted from the operation of the law, or even given compensation for the property interest in slaves which they lost? Mexico offered some compensation to American proprietors affected by her land laws. But since the compensation was to be in the form of Mexican national bonds, which might become worthless, the offer was not deemed especially attractive. Finally, however, an executive agreement between the two countries was signed which provided that the rights of Americans to lands acquired prior to 1917 and to subsoil deposits acquired and exploited prior to that date should remain intact, while those acquired later were subject to the provisions of the constitution. As a result of this agreement, the United States extended recognition to the Obregon Government.

Shortly thereafter, a rebellion under de la Huerta broke out against the Obregon Government. In this emergency, the United States deemed it desirable to take suitable measures to assist the Government which it had recognized in maintaining itself in power. This it did by selling surplus arms and ammunition to the Obregon Government. In January, 1924, President Coolidge also proclaimed an embargo on the shipment of arms to Mexico except such as were approved by our Government for shipment to the Obregon Government. The rebellion was put down, and shortly thereafter, Calles succeeded Obregon as President of Mexico.

Early in 1926 relations with Mexico were again strained through her adoption of oil and land laws designed to carry out in detail the principles embodied in the Constitution of 1917 relating to the nationalization of subsoil deposits and the breaking up of large landed estates. Among other provisions, the laws required aliens to waive the right

to invoke the diplomatic protection of their governments as far as their property rights in Mexico were concerned. Our Secretary of State, Kellogg, objected strenuously to this provision, declaring that it could not absolve our Government from the obligation of protecting its citizens in their rights in Mexico. He also maintained that the laws were retroactive and confiscatory as to vested rights to the subsoil acquired prior to 1917 even though not exploited by that date. This, he intimated, was in violation of assurances given in 1923, in consideration of which the United States recognized the Obregon Government.

The Mexican reply was to the effect that the Calles administration did not consider itself bound by the assurances given in 1923, since they were not embodied in a treaty. It was also maintained that diplomatic protest by the United States should not be made until specific instances of violation of property rights had occurred.

This whole controversy illustrates an almost inevitable collision between two antagonistic principles—the vested rights of foreigners and the rising spirit of nationalism.<sup>1</sup> American capital has gone into Mexico, originally at the invitation, or at least with the encouragement of the Mexican Government. Since there was little native capital available for the purpose, foreign capital was a necessary implement in the development of the marvelous natural resources of the country. When, however, the previous policy was changed and it seemed to the Mexican Government that further exploitation of these resources by foreign capital was not compatible with the best interests of the nation, it was inevitable that great difficulties should be encountered in putting this policy into effect.

With reference to our controversy over the Mexican land laws, President Coolidge stated in April, 1927, that “the person and property of a citizen are a part of the general

<sup>1</sup> W. Lippmann, “Vested Rights and Nationalism,” *Foreign Affairs* (April, 1927), 356.

domain of the nation even when abroad." Although subject to different constructions, this statement may be interpreted as an assertion of the extraterritoriality of American investments in Mexico. This breathes the spirit of imperialism as embodied in concessions, protectorates, and spheres of influence and is antagonistic to the rising tide of nationalism in backward countries. Were the spirit of imperialism as rampant in the United States as in some of the leading countries of Europe, Mexico would doubtless long ago have been annexed. With the exception of a handful of persons having special interests in the matter, the people of the United States are sincerely desirous of living on friendly terms with Mexico. Many of them sympathize with her in the great effort she is making to promote social justice and to preserve her natural resources for the benefit of the nation. Public opinion in the United States and the moral sense of her people would not tolerate a war of pure aggression or aggrandizement against Mexico.

Fortunately, relations with Mexico during the year 1927 entered upon a more friendly phase. It is true that these relations were somewhat strained when the Mexican anti-alien land and petroleum laws went into effect in January. A diplomatic *impasse* between the two governments seemed for the time being to have been reached. Under these circumstances a demand arose in this country for the arbitration of the controversy. A resolution favoring arbitration was passed by the Senate by unanimous vote. President Coolidge, however, indicated that he was opposed to arbitration and declared that, in his opinion, the matter was susceptible of adjustment through negotiation. The tension between the two governments was greatly relieved when, in November, 1927, the Mexican Supreme Court, in a case in which an American petroleum corporation was a party, held unconstitutional two important articles of the Mexican petroleum law. Our State Department hailed the decision as promising an adjustment of the entire controversy.

This adjustment was brought about early in 1928 through the enactment by the Mexican Congress of oil legislation in conformity with the Supreme Court's decision.

In 1927 Dwight Morrow was appointed American ambassador to Mexico. Although without previous diplomatic experience, he proved to be an able diplomat and assisted greatly in maintaining friendly relations between the two countries.

When the immigration act was passed by Congress in 1924, Mexico, along with the other countries of the Western Hemisphere, was not placed under the quota system. The question as to whether Mexican immigration to the United States should be restricted has been much debated. In view of depression and unemployment in this country, a very considerable reduction of Mexican immigration was effected in 1930. This was brought about through our government's refusal of visas to applicants likely to become public charges, as well as to contract laborers, illiterates, and defectives.

In 1935 conditions in Mexico were disturbed on account of a struggle which broke out there between church and state. Although this was a matter which did not directly affect the United States, much pressure was brought to bear upon our Government to take a hand in the struggle by intervening in Mexico. Senator Borah of Idaho introduced a resolution in the Senate calling for an investigation of conditions in Mexico. In spite of this pressure, however, our Government steadfastly declined to intervene in what it regarded as a domestic dispute within a neighboring country. Our Government's attitude in this matter seems wise in view of the fact that any attempt on our part to intervene would naturally be resented by the Mexican Government and by most of the Mexican people, and would probably not benefit any persecuted class of people in Mexico.

Towards Mexico, it has been declared, "the United

States has exhibited, at great cost of life and property to its citizens, almost a Gallilean forbearance. . . . Under conditions of the greatest provocation, it has stood quietly as a good neighbor by the side of a sister republic during years of trial. By great sacrifices of its citizens it has helped Mexico to rise on her own feet and to stand unaided in an anxious world. In all history there is no such example."<sup>1</sup>

## NICARAGUA

Of the five Central American republics, Nicaragua is the largest and has for many decades been of special interest to the United States on account of the possibilities of its territory for the future construction of an inter-oceanic canal. These republics are among the most backward nations in the Western Hemisphere. Efforts have been made from time to time to bring them back together in a federal union, but mutual rivalries and jealousies have thus far kept them apart. Of the five countries, Nicaragua has been one of the most turbulent. It has been afflicted with numerous revolutions as well as with wars with its neighbors.

At the conclusion of one of the Central American wars in 1907, a conference of the five republics was held at Washington at the suggestion of the United States and Mexico. A treaty was drawn up and signed by all of them, which provided for the establishment of the Central American Court of Justice. This tribunal was to be composed of five judges, one to be appointed by each of the five states. It was hoped that the court would help to prevent future wars among the signatory republics through settling the disputes which give rise to them. For this purpose it was given compulsory jurisdiction over such disputes, and its decision was to be final and binding on the parties.

<sup>1</sup>S. F. Bemis, *A Diplomatic History of the United States* (New York, 1936), pp. 539, 564.

In 1909 there broke out in Nicaragua a revolution inspired by growing opposition to the arbitrary policy and bellicose attitude of President Zelaya. Although the United States at first remained neutral, it found it necessary to intervene for the protection of American and foreign lives and property, which would have been endangered by the threatened bombardment of Bluefields by the Zelaya faction. As a result of American intervention, the revolutionists were successful, but were unable to maintain themselves in power without American assistance. Consequently, in 1912, a detachment of American marines was landed at Managua by order of President Taft. Even after order had been restored under the revolutionary Government, some of these marines continued to be stationed there, and were not finally withdrawn until 1933.

The revolutionary Government was in need not only of military, but also of financial, assistance from the United States. In order to meet this need, a treaty, known as the Bryan-Chamorro Treaty, was negotiated and finally ratified by both countries in 1916. Under the terms of the treaty, Nicaragua grants in perpetuity to the United States, free from taxation, the exclusive proprietary rights necessary and convenient for the construction, operation, and maintenance of a canal by way of the San Juan River and the great lake, or by any other route. In order to enable the United States to protect the Panama Canal and the proprietary rights above granted, Nicaragua also leases to the United States for a period of ninety-nine years, subject to renewal, the Great Corn and Little Corn Islands and a naval base on Nicaraguan territory, bordering on the Gulf of Fonseca. In consideration of these grants, the United States agrees to make available the sum of \$3,000,000 to be applied by Nicaragua to the reduction of her debt and to other public purposes. Disbursements from this sum are to be subject to the approval of the Secretary of State of the United States or such person as he may designate. To



these provisions, the Senate of the United States added a reservation which stipulated that "whereas, Costa Rica, El Salvador, and Honduras have protested against the ratification of the said convention in the fear or belief that said convention might in some respect impair existing rights of said states; therefore, it is declared . . . that nothing in said convention is intended to affect any existing right of any of the said named states."<sup>1</sup>

Costa Rica and Salvador were not satisfied with this reservation and endeavored to prevent Nicaragua from carrying out its obligations under the treaty by bringing suits in the Central American Court of Justice. Costa Rica's claim was based on a prior treaty with Nicaragua giving Costa Rica rights in the San Juan River, while Salvador claimed that the proposed naval base on the Gulf of Fonseca would menace her rights. Salvador also claimed that such a naval base would endanger the neutrality of Honduras, which had been proclaimed by the Washington conference of 1907. In both cases, the court decided in favor of the plaintiff and against Nicaragua. The latter, however, as well as the United States, declined to accept the decision of the court, and, very largely as a result, the court went out of existence in 1918. Thus ended a very promising experiment in Central American coöperation, whose establishment the United States had heartily encouraged but whose downfall it had brought about when the court rendered a decision deemed to be against the political interests of the United States. Such an incident is calculated to make a very unfavorable impression upon the view which Latin America holds regarding the Central American policy of the United States.

Conditions in Nicaragua continued to be disturbed. The intervention of the United States during the Taft administration in order to overcome the disorders and

<sup>1</sup> *Treaties of the United States, 1910-1923*, Sen. doc. 348, 67th Cong., 4th sess. (Serial No. 8167), pp. 2740-2743.

iniquities of the Liberal administration under Zelaya, although seemingly a necessary assumption of responsibility on our part, brought with it a heritage of trouble. The fundamental cause of the difficulty was that the Conservatives who opposed Zelaya were not strong enough to maintain themselves in power without outside assistance. The United States thus found itself in the position of maintaining, by force, a minority party in power. But it felt it necessary to persist in this policy because the Conservative party was the one which seemed most favorable to the protection of American rights, in respect both to the property and investments of American individuals and corporations and also to the future canal route. The tonnage passing through the Panama canal is rapidly approaching the limit of its capacity and the nature of the adjacent land renders its enlargement difficult if not impossible. From the engineering and commercial points of view, therefore, the proposed Nicaraguan canal route is becoming increasingly more important. Although the Nicaragua canal may not be dug for a generation, nevertheless the prospect that it must ultimately be constructed has undoubtedly affected the Nicaraguan policy of the United States.

Since 1913 a principle of American policy towards Nicaragua has been to refuse to recognize *de facto* governments based on revolution or violence. The five Central American republics, at a conference held in Washington in 1923, agreed that they would not recognize such governments, and the United States, although not a party to the agreement, has nevertheless adhered to the same policy. Thus, in 1926, following the withdrawal of American marines, General Chamorro executed a *coup d'état* and established a revolutionary Government. Our mere refusal to recognize a government such as those usually found in Nicaragua is a form of negative intervention. Without our recognition, it is difficult if not impossible for the Government

to borrow money. Without money it cannot maintain itself for long. The receipts from internal taxes amount to little, and the custom dues are collected by an American fiscal agent and the proceeds devoted to the paying off of previously existing debt. In the case of the Chamorro Government, our refusal to recognize it soon brought about its downfall.

Our policy of not recognizing revolutionary governments in Nicaragua and other Latin American countries may be attacked as inconsistent, in view of the fact that our own Government was revolutionary in origin. The analogy, however, is defective since we were rebelling against a mother country whose policy we deemed to be subversive of our interests, while revolutions in Nicaragua and other Central American countries denote merely changes of party control over the government. Party contests there are extremely bitter, and since the party in power controls the elections through force and intimidation, the "outs" have practically no chance of becoming the "ins" without resorting to violence. In view of this situation, the policy of the United States in not recognizing a revolutionary government, in so far as it discourages revolution, merely tends to perpetuate in power a government which perhaps no longer has the support of the majority of the people. In order to overcome this difficulty, the United States Government has felt it desirable to undertake the supervision of presidential elections in Nicaragua.

If and when a president is chosen in Nicaragua whom the United States deems to have acquired his position in a legitimate manner, the recognition of our Government will be extended to him. Thus, shortly after Diaz was elected President by the Nicaraguan Congress in November, 1926, we recognized him. We had shortly before placed an embargo on the shipment of arms and munitions to all parties in Nicaragua in order to reduce the amount of fighting and bloodshed. Nevertheless, the Liberals started a rebellion

against Diaz and, according to a statement of President Coolidge in a special message to Congress, January 10, 1927, were receiving arms and munitions from Mexico. We therefore raised our embargo so that the Diaz Government might import arms. We were not content, however, to let the contending parties fight the matter out to a conclusion without extending active assistance to the Government which we had recognized. The lives and property of American citizens, as well as of foreigners, were thought to be in danger, and under these circumstances, our Government ordered the landing of marines in Nicaragua for their protection.

During 1927 our relations with Nicaragua continued in a more or less unsettled state. The United States continued to support the conservative or Diaz Government, although it was doubtful whether this Government commanded the support of the majority of the Nicaraguan people. At any rate, this Government was too weak to maintain order without American assistance. Consequently, the presence of American marines was deemed by our Government to be necessary in order to protect American lives and property. The American policy of armed intervention was subjected to sharp criticism in the United States. Senator Borah declared that "it ought to be regarded as a crime to defend by force and with American marines a title or a claim that cannot stand the inspection of an arbitrator." On the other hand, President Coolidge, in defending our policy, said: "We are not making war on Nicaragua any more than a policeman on the street is making war on passersby. We are there to protect our citizens and their property from being destroyed by war." He added this significant statement:

"Toward the Governments of countries which we have recognized this side of the Panama Canal we feel a moral responsibility that does not attach to other nations. We wish them to feel that our recognition is of real value to

them and that they can count on such support as we can lawfully give when they are beset with difficulties. We have undertaken to discourage revolutions within that area and to encourage settlement of political differences by the peaceful method of elections.”

In other words, it would seem that the recognition by the United States of one of two contending factions in a Central American republic places upon us the positive responsibility to use force if necessary in maintaining in power the faction which we have recognized. Such American support is to continue at least until an election can be held which will presumably determine which faction has the largest popular support.

To assist in carrying out his program, President Coolidge sent Henry L. Stimson as his personal representative to Nicaragua, who succeeded in inducing both factions to agree to his peace terms. These included, among other things, complete disarmament on both sides, organization of a Nicaraguan constabulary commanded by American officers, and American supervision of the presidential election to be held in Nicaragua in 1928. Such supervision included not merely the preservation of order at the time of the election but sufficient control over the preliminary steps, including registration, to see that every qualified voter had an opportunity to register. The American marines were to be left in Nicaragua for police duty until after the election.

Although the two main contending factions agreed to these terms, one Sandino, a rebel general, refused to recognize them and continued for years to give the United States trouble by attacking the marines.

Nevertheless, registration for the presidential election of 1928 in Nicaragua took place under the protection of American marines and the Nicaragua National Guard, who prevented efforts of disaffected elements to intimidate the voters. The result was a largely increased registration.

The election was held in November, 1928, under the supervision of a board of which Brig. Gen. F. R. McCoy, U. S. A., was chairman, and approximately 132,000 votes were cast. This was probably the fairest election ever held in Nicaragua up to that time.

As in 1928, so again in 1930, the congressional elections in Nicaragua were supervised, at the request of the Nicaraguan Government, by representatives of the United States Government. Captain Alfred Johnson of the United States Navy acted as chairman of the national electoral board, with broad powers over both registration of voters and the elections. Several hundred picked men from the United States navy acted as members of the American electoral supervisory mission.

American marines still remained in Nicaragua in 1930 for police duty against the bandits, who had not been entirely suppressed. The policy of our Government, however, was to place responsibility for maintaining order upon the native constabulary, over whom our marines acted as officers.

During 1931 sporadic attacks by bandits under Sandino continued to keep conditions in Nicaragua somewhat unsettled. In general, however, order was maintained through the efforts of the native constabulary, officered by American marines. During that year, the number of such marines in Nicaragua was considerably reduced, and it was the announced intention of the American Government to withdraw them altogether as soon as Nicaragua was in a position to conduct free and fair elections without assistance.

In 1932 the Nicaraguan presidential election was held under the supervision of the United States Electoral Mission, of which the chairman was Admiral C. H. Woodward, who was designated by the United States Government and confirmed by the Supreme Court of Nicaragua. This election differed from those of 1928 and 1930 in that Nicaraguan

citizens were given a larger share of the electoral work in order that they might acquire experience in such matters.

Concomitantly with the gradual withdrawal of the marines, the State Department also pursued the policy of extending less general protection to American citizens in Nicaragua. In April, 1931, Secretary Stimson recommended to all Americans "who do not feel secure under the protection afforded them by the Nicaraguan Government" to withdraw from the interior to the coast towns, whence they can be protected or evacuated. He added that those "who remain do so at their own risk and must not expect American forces to be sent inland to their aid." His intention was that American citizens in Nicaragua should have such protection as American citizens in foreign lands generally are entitled to receive under international law. There seemed to be no good reason why they should receive more protection than this, in view of the increasing efficiency of the native constabulary and the absence of foreign intervention.

In reference to Nicaragua, the State Department was gradually working towards the policy of non-intervention. It seemed that the time had arrived when the United States might safely leave Nicaragua and other Latin-American countries to work out their own destiny without interference, so long as there was no threat of intervention by any non-American power. American marines were finally withdrawn from Nicaragua in January, 1933.

#### RECENT RECOGNITION POLICY

An important touchstone of our attitude toward Latin-American countries may be found in our recognition policy. From the time of Jefferson to that of Wilson, it was our policy to recognize *de facto* stable governments regardless of their revolutionary origin. President Wilson, however, introduced the policy of refusing to recognize governments

set up by violence and not in accordance with constitutional methods. For example, he refused to recognize the Huerta government in Mexico in 1914 and the Tinoco government in Costa Rica in 1917. This policy was followed by succeeding Administrations, with the result that the Chamorro government in Nicaragua was refused recognition in 1926. This soon brought about its downfall. The purpose of the non-recognition policy was to discourage revolutions. In evaluating this policy, however, it is necessary to distinguish between different kinds of revolutions. Some are due merely to a personal struggle for power by rival leaders. These no doubt should be discouraged. But some revolutions represent the deep-seated aspirations of the mass of the people for a change of government. It sometimes happens that an unpopular régime can be overthrown only by violence, because the existing government controls the elections by force, fraud, and intimidation. Since a change of government or party control cannot be brought about by ballots, this can ordinarily be done only by bullets. Our policy of non-recognition under these circumstances may prevent the people from exercising the right of any independent people to change their government. It is a form of negative intervention on our part, whereby we set up a standard of constitutionalism and require them to meet it before we will recognize them.

Nevertheless, this policy was adhered to by our government until 1930. By that date, the world-wide economic depression, with accompanying low prices, had unsettled conditions in Latin America to such an extent that revolutions occurred even in hitherto stable republics of South America, such as Argentina, Brazil, Peru, and Bolivia. We then changed our policy and promptly recognized the new governments of those countries as soon as they appeared to be stable.

In 1931, Secretary Stimson formally announced the



abandonment of the Wilsonian policy based on constitutionalism and a return to the previous policy, which was "to base the act of recognition not upon the question of the constitutional legitimacy of the new government, but upon its *de facto* capacity to fulfill its international obligations." Recognition was to be dependent also upon the control by the government of the administrative machinery and upon the general acquiescence of the people. This new Stimson policy was in harmony with the general principle of reducing the intervention of the United States in Latin-American affairs. But Secretary Stimson admitted that an important exception to this policy must be allowed in the case of the five Central American republics, because, by conventions adopted among themselves in 1907 and in 1923, they had agreed not to recognize revolutionary governments. The United States was not a party to these agreements, but it had sponsored them, and therefore announced that it would govern its policy accordingly.

It remained for the Roosevelt Administration finally to do away with even this exception. The Martinez government in El Salvador, although revolutionary in origin, maintained itself in power for about two years without our recognition. After it had been recognized by other Central American republics, the United States in January, 1934, also recognized it.<sup>1</sup>

In Cuba, we also now act upon the principle of recognizing *de facto* governments which appear to be stable, to be able to maintain law and order, and to represent the will of the Cuban people. Our recognition of Russia was in harmony with the same principle. In Latin America, European powers usually follow the example of the United States in the matter of recognition, but the reverse was true in the case of Russia.<sup>2</sup>

<sup>1</sup> In 1932 Costa Rica and El Salvador had denounced the Convention of 1923.

<sup>2</sup> For further discussion of the recognition of Russia, see below, Appendix VI.

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## CHAPTER V

### THE PANAMA CANAL

THE Panama Canal has been called the "greatest liberty man has ever taken with nature." It was an engineering feat of tremendous difficulty, but the legal and diplomatic difficulties which stood in the way of its construction were almost equally great. Another difficulty was that of raising the huge amount of capital necessary to carry out such an enterprise. The actual work of construction might be carried on either by a government or by a private corporation under the control of one or more governments. In this case, strange to say, private enterprise turned out to be less efficient than public. A French company, under De Lesseps, the celebrated builder of the Suez Canal, which attempted the construction of the Panama Canal, failed after the loss of much money and many lives. The two most feasible routes for an interoceanic canal were the Panama and Nicaragua routes, but the governments through whose territory these routes ran, as well as the immediately neighboring governments, were too lacking in financial and engineering resources to attempt on their own responsibility to carry out such a project. Consequently, the only remaining alternative was for some more powerful nation, or group of nations, with adequate resources, to undertake the enterprise.

Among the nations of the world with adequate resources, the United States had the most vital interest in the construction of the canal. Our policy with reference to this matter, however, has passed through several stages. As early as 1826, Secretary of State Henry Clay instructed our

delegates to the Panama Congress that the canal project might properly be considered at that gathering, and that when constructed it should not be under the control of any one nation and its benefits "should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls." At this time and until nearly the middle of the nineteenth century, the policy of the United States was that the canal should be dug by private enterprise and that there should be no single political control over it. We made no claim to exercise exclusive rights over the canal, but we were also opposed to any other nation exercising exclusive rights. For this reason we looked with uneasiness upon the protectorate which Great Britain had established over the Mosquito Indians on what is now the east coast of Nicaragua. This position, if unchallenged, would enable her to dominate one of the termini of the canal in case the Nicaragua route should be chosen.

Certain events which occurred at about the middle of the century greatly increased the interest of the American people in a trans-isthmian canal. By the Treaty of Guadeloupe Hidalgo made with Mexico in 1848, the United States was granted territory extending to the Pacific Coast and including what is now the state of California. At about the same time the news that gold had been discovered in that region spread to the East, causing a rush of men to the coast. Since the transcontinental railroads had not yet been built, the means of getting across the great American Desert were meager and difficult. This situation emphasized the importance of the canal as a connecting link between our East and West Coasts. In this connection, it may also be mentioned that when the Spanish-American War broke out in 1898, one of our most powerful fighting ships, the *Oregon*, was on the Pacific Coast. She made a spectacular run around Cape Horn in order to get into the fray in the Caribbean. If the canal had then been open, this run would have been shortened by several thousand miles, with

a corresponding increase in the effectiveness of our naval force.

At about the middle of the nineteenth century, the United States entered into two treaties which undertook to define our position with reference to a canal along the two possible routes. They both contemplated the neutralization of the canal. The first treaty was that of 1846 with New Granada, by which name the Republic of Colombia was then known. New Granada guaranteed to the United States "that the right of way or transit across the Isthmus of Panama, upon any modes of communication that now exist or that may hereafter be constructed, shall be open and free to the government and citizens of the United States." On her part, the United States guaranteed to New Granada "the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantees, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."<sup>1</sup> This treaty was still in force in 1903 when the revolution took place in Panama.

The second of the two treaties referred to above was the celebrated Clayton-Bulwer Treaty made in 1850 with Great Britain. This provided that Great Britain and the United States (1) should never obtain or maintain exclusive control over the proposed Nicaragua canal; (2) should never erect fortifications commanding the canal nor exercise dominion over any part of Central America; (3) should maintain the safety and neutrality of the canal in the event of war; and (4), in order to establish a general principle, should extend their protection to any other practicable line of communication, whether by canal or railway, such as that proposed to be established by way of Panama. This last provision prevented the United States from getting

<sup>1</sup> Malloy, *Treaties*, I, 302.

around Great Britain's claim by abandoning the Nicaragua route in favor of the one through Panama. On the whole, the United States seems to have conceded more by this treaty than was necessary. It is probably going too far, however, to say that the treaty violated the Monroe Doctrine, since Great Britain's claim to the Mosquito Coast antedated the original statement of that principle. At any rate, the interpretation of the treaty became a bone of contention between the two governments for the next half century.

It was not until some time after the Civil War that the United States began to consider that the policy of joint or international political control over the canal was inconsistent with our interests. In 1878, a French company with which the name of De Lesseps was associated, secured from Colombia a concession granting the right to construct a canal across Panama and shortly afterwards took steps looking toward actual operations. Public opinion in the United States became alarmed at the prospects of a canal under European control which some thought would violate the Monroe Doctrine as well as strike a blow at the vital interest of the United States in the project. Under these circumstances, President Hayes, in a special message to Congress, March 8, 1880, thus stated what he considered should be the policy of the United States toward the canal:

“The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power . . . If existing treaties between the United States and other nations, or if the rights of sovereignty or property of other nations stand in the way of this policy, . . . suitable steps should be taken by just and liberal negotiations to promote and establish the American policy on this subject, consistently with the rights of the nations to be affected by it . . .

“An interoceanic canal across the American isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States and be-

tween the United States and the rest of the world. It will be the great ocean thoroughfare between our Atlantic and Pacific shores and virtually a part of the coastline of the United States. Our merely commercial interest in it is larger than that of all other countries, while its relation to our power and prosperity as a nation, to our means of defense, our unity, peace, and safety, are matters of paramount concern to the people of the United States.”<sup>1</sup>

In the way of this conception of an American-controlled canal stood the Clayton-Bulwer Treaty. Consequently, Mr. Blaine, on becoming Secretary of State in 1881, sent a communication to the British Government in which he sought to establish our position along the lines of President Hayes’ message, all the while ignoring the Clayton-Bulwer Treaty. Later, when this method of attack did not seem promising, he sent another communication in which he argued that, on account of changed conditions, the treaty should be considered as no longer in force. The British Government, however, had no difficulty in showing that there was no sound basis for these contentions. Thus matters stood until the end of the century, when such circumstances as the Boer War, the Spanish War, and the Alaska boundary dispute influenced the British Government to yield to Secretary Hay’s desire for the negotiation of a new treaty to displace that of Clayton-Bulwer. The new treaty, known as the Hay-Pauncefote Treaty, was finally ratified in 1901. It expressly abrogated the Clayton-Bulwer Treaty. It further provided that the canal might be constructed under the auspices of the United States, which should have the exclusive right to manage it. It declared, however, that it should be open on terms of equality to vessels of commerce and of war of all nations observing the regulations for the government of the canal. There was to be no blockade of the terminals, but the United States was given the right to police the canal and maintain order. Nothing was said

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, VII, 585.

about fortifications, but the logical inference was that, in the absence of any prohibition, the United States could fortify the canal. Finally, the treaty provided that no change of territorial sovereignty in the country traversed by the canal should affect the general principle of neutralization applied to it.

The Hay-Pauncefote Treaty removed all difficulty, as far as Great Britain was concerned, in the way of the United States' proceeding with the building of the canal. It was still necessary, however, first, to select the route, and, secondly, to secure local rights of construction from the government through whose territory the selected route ran.

At first, both official and popular opinion in the United States seemed to favor the Nicaragua route, and a commission appointed to investigate the matter made a preliminary report favoring this route. The French company, however, realizing that their holdings would be worthless if the United States adopted the Nicaragua route, offered to sell out at the low figure of \$40,000,000. Partly on account of this offer and partly through political influences brought to bear by agents of the French Company and others, Congress finally passed an act in 1902 authorizing the President to purchase the rights of the French company at the figure mentioned and to secure the necessary rights from Colombia for the construction of the canal over the Panama route.

All was smooth sailing until it came to securing from Colombia the necessary rights. A treaty with that country, known as the Hay-Herran Treaty, was negotiated which provided that the United States should have the right to construct and operate the canal and should pay to Colombia \$10,000,000 in cash and an annuity of \$250,000. This treaty was ratified by the United States Senate early in 1903. When, however, our Government declined to consider amendments to increase the amount of the compensation, the Colombian Senate rejected the treaty. The ostensible reason for the action of Colombia was that the treaty re-



stricted her sovereignty, but the real reason seems to have been her determination to make the United States pay a larger sum than the treaty stipulated.

The failure of the negotiations was a disappointment not only to the United States but also to the inhabitants of the isthmus, who were desirous of having the canal built across their territory. Could they have been assured of the support of the United States, they were ready to start a revolution against Colombia. Although our Government was undoubtedly sympathetic toward the aspirations of the people of Panama for independence, it naturally could give no formal assurance of support. Nevertheless, in anticipation of an uprising on the isthmus, our Government dispatched a warship to the vicinity with orders to "prevent the landing of any armed force with hostile intent, either government or insurgent, at any point within fifty miles of Panama."

Events then moved with startling rapidity. Encouraged by the presence of American forces, the insurrection immediately broke out and was successful. Colombian officials were arrested and the independent republic of Panama was immediately proclaimed. Colombia was unable to send reinforcements to put down the insurrection, because our forces were there to prevent her from doing so. In November, 1903, a few days after the revolution, the United States formally recognized the independence of the new republic.

Our action in giving at least moral support to an insurrection in a supposedly friendly country was denounced by many persons in the United States as indefensible both in law and in morals. Naturally, Colombia was highly incensed and other Latin American countries looked with misgivings upon this manifestation of a high-handed policy. President Roosevelt, however, who was mainly responsible for this policy, deemed it necessary in the interest of collective civilization. The policy rested upon the somewhat

insecure foundation that the end justifies the means. Although the United States had the greatest interest in furthering this end, it was not an entirely selfish one, since the whole world would benefit from the canal. President Roosevelt afterwards avowed that he took the canal rather than let Congress debate the matter indefinitely, and, in doing so, he may be said to have exercised a sort of international eminent domain.

Immediately upon the establishment of the new republic of Panama, the United States made a treaty with her which was ratified by both parties and became effective in 1904. By its terms the United States guaranteed the independence of Panama and agreed to pay her \$10,000,000 in cash and an annual subsidy of \$250,000 beginning nine years after the ratification of the treaty. In return, Panama granted to the United States in perpetuity a zone of land ten miles wide extending across the isthmus. The grant carried with it practically sovereign power and ample control for the purpose of constructing and operating the canal. All diplomatic obstacles having thus been finally swept aside, the United States then proceeded with the building of the canal, and it was opened for business in 1914.

While the United States thus accomplished its purpose in bringing to completion this great engineering and commercial project, relations with Colombia remained in a strained condition. Technically at least, there seems little doubt that she had suffered a wrong at our hands. Even though we supported our action on the ground of international eminent domain, the country thus deprived of territory was entitled to compensation. It is true that she had spurned our first offer, but it was hardly within our rights to determine conclusively that the amount offered was sufficient and that by refusing it she had precluded herself from again preferring any claim. Consequently several successive attempts were made by our Government during the Roosevelt, Taft, and Wilson administrations to secure

the adoption of treaties which would placate Colombia. All of them failed on account of the refusal of either Colombia or our Senate to ratify them. Colombia demanded that the whole matter be submitted to arbitration, but to this we declined to agree. The treaty negotiated during the Wilson administration called for our payment to Colombia of an indemnity of \$25,000,000. This proposed payment President Roosevelt denounced as international blackmail, and the treaty failed of ratification in the Senate.

The long-continued difficulty with Colombia was detrimental to business interests of the United States in that country. Consequently, early in President Harding's administration the time seemed opportune for bringing the controversy to a close through the adoption of a mutually satisfactory treaty. For this purpose the treaty signed during the Wilson administration was resurrected, and, with certain changes, it was ratified by both parties and became effective in 1922. It provided that the \$25,000,000 should be paid in five equal annual installments and, instead of expressing any regret on our part, merely recited that the two parties were desirous "to remove all the misunderstanding growing out of the political events in Panama in November, 1903."<sup>1</sup>

#### THE TOLLS CONTROVERSY

In anticipation of the early completion of the canal, Congress, in 1912, passed an act for the government of the zone and for the regulation of the traffic. The President was authorized, within certain limits, to prescribe the tolls to be charged vessels going through the canal. It was stipulated, however, that no tolls should be charged on vessels engaged in the coastwise trade of the United States. Since, under the law, only American vessels could engage in such trade, this provision would work for the benefit of the owners of

<sup>1</sup> *Treaties of the United States, 1910-1923*, Sen. doc. 348, 67th Cong., 4th sess., p. 2538.

such American vessels, and to that extent would operate as a discrimination against foreign vessels.

The Hay-Pauncefote Treaty of 1901 had provided that the canal should be open on terms of equality to vessels of all nations observing the rules. Great Britain protested that the exemption of American vessels from the payment of tolls was in conflict with this provision of the treaty. Her foreign minister, Lord Grey, argued that since the tolls charged were to be proportionate to the cost of maintenance of the canal, the exemption of American ships would place an undue burden on foreign ships. He also suggested that the coastwise trade might not always be *bona fide*, that is, goods from foreign ports might be transferred to coastwise vessels. President Taft suggested that the difficulty might be overcome by refunding to American ships the tolls they were charged, but Lord Grey argued that, while the United States had a right to grant a general subsidy, such a grant to certain shipping in a particular way would violate the spirit of the treaty. The British Government further suggested that the question should be submitted to arbitration.

Secretary of State Knox, on behalf of our Government, argued that the phrase "all nations" in the treaty did not include the United States. He also suggested that since no actual discrimination had yet taken place, Great Britain had no just ground for complaint. He did not admit that the question was suitable for arbitration. It was also argued that the United States was the proprietor of the canal and fixed the rules for the treatment of the customers, and that, therefore, the equality of treatment called for by the treaty applied merely to the vessels of foreign nations.

In spite of these somewhat specious arguments, it seems clear that when the treaty was originally negotiated, the term "all nations" was generally understood to include the United States. In 1914 President Wilson appeared before a joint session of Congress and urged the repeal of the ex-

emption clause of the tolls act on three grounds: (1) the interpretation of the treaty was a debatable point and a great nation like the United States ought not to quibble and haggle over such a point; (2) from the standpoint of internal policy, the exemption of American vessels would be an economic mistake because granting a special privilege; and (3) the repeal of the exemption clause would greatly assist the Administration in dealing with certain matters connected with its foreign policy. This last statement was somewhat cryptic, but probably referred to Wilson's opposition to Huerta in Mexico. After considerable debate, Congress in the same year complied with the President's request and passed an act repealing the exemption clause of the previous act. In the Senate, however, a reservation was inserted to the effect that the repeal was not to be construed as a relinquishment by the United States of any rights which it might have under the Hay-Pauncefote Treaty to exempt its own vessels from the payment of tolls. In 1921, the Senate attempted to act upon this reservation by passing a bill granting exemption to American vessels, but the bill died in the House of Representatives.

#### RELATIONS WITH PANAMA

Shortly after the treaty of 1904 was entered into between the United States and Panama providing for the cession of the Canal Zone, a controversy arose between the two countries as to the meaning and interpretation of the treaty. The occupation of the Canal Zone by the United States authorities had created complicated problems connected with their relations with authorities of the Panama Government in immediately adjacent territory. The Panama Government maintained that the treaty had not transferred the sovereignty over the Canal Zone to the United States, but that this was retained by Panama, subject only to such rights of the United States as had been

specifically granted in the treaty. Secretary Hay, on behalf of the United States, denied that this was the proper interpretation of the treaty and maintained that the United States was sovereign within the ceded zone.<sup>1</sup> This controversy was temporarily settled by a *modus vivendi* known as the Taft Agreement, which was in effect from 1904 to 1924. It effected a workable compromise between the extreme contentions of the two Governments. In 1926 a treaty embodying in the main the provisions of the Taft Agreement was negotiated, but failed of ratification. Nevertheless, the rights of the United States to fortify the Canal Zone and to provide for its sanitation were amply recognized by the treaty of 1904, which remained in effect.

By the Treaty of 1904, the United States guaranteed the independence of Panama. This has involved the United States in boundary disputes between Panama and the neighboring republics of Colombia and Costa Rica. Another article of this treaty authorized the United States to maintain public order in the cities of Panama and Colon and adjacent territories "in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order." The right of the United States to intervene to maintain order was also recognized by the Panaman Constitution. Although these provisions did not impose a duty upon the United States to guarantee public order in Panama, our Government has nevertheless intervened therein for this purpose on several occasions. The position of the United States was that, while it was primarily the duty of the Panaman Government to maintain order in its own territory, if it was unable or unwilling to do so, American intervention for this purpose would be justified.

Disorders have frequently broken out in Panama in connection with the holding of presidential elections, and consequently the need for American intervention has been

<sup>1</sup> *Foreign Relations of the United States*, 1904, p. 613.

especially great at these times. For the purpose not only of maintaining order, but also of seeing that the elections were properly conducted, United States authorities took over the supervision of the elections to some extent in 1908 and to a greater extent in 1912 and 1918. This was done at the request of the Panama Government.

The United States has frequently felt impelled to make diplomatic representations to Panama for the improvement of conditions there, and has sometimes gone further and intervened by force. Thus, our troops policed Colon and Panama City in 1918 and the latter city again in 1925, and from 1918 to 1920 one of the provinces of the Republic was under occupation by American troops in order to maintain order and to protect American lives and property. In 1931, however, when a revolution took place in Panama, the United States, in accordance with its general policy of withdrawal from active intervention in Latin-American affairs, did not intervene.

The treaty of 1904 provided that the United States should make to Panama an annual payment of \$250,000 in "gold coin of the United States." In view, however, of domestic legislation in the United States suspending gold payments and devaluing the dollar, our Government in 1934 tendered the fiscal agent of the Panama Government a check for 250,000 of such devalued dollars. That Government returned the check and demanded gold, as provided by the treaty. It appeared that the loss through our failure to pay in gold fell not altogether upon Panama but to some extent, at least, on holders of Panama's bonds residing in the United States, since the annuity was used to meet the service charges on these bonds. A compromise agreement was reached in 1935 whereby annuities which had accrued since the devaluation of the dollar would be made in gold, but future payments would be made in devalued dollars.

In 1935 a new treaty between the United States and

Panama was being negotiated to take the place of the treaty of 1904. The new treaty was signed by the two parties in March, 1936. It provided, among other things, that, in case of a threat of aggression against the Canal Zone, the two countries were to consult together for mutual defense. "While fully safeguarding our complete control over the Canal, it yet provided for a more fair and equitable treatment for the commercial interests of the Panamanian people than had previously existed, and abolished the right of intervention in Panama which the United States had previously possessed."<sup>1</sup> It was hoped that this treaty, if and when ratified, would settle satisfactorily the outstanding differences between the two countries.

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<sup>1</sup> Sumner Welles, "The New Era in Pan American Relations," *Foreign Affairs*, April, 1937, p. 444.



## CHAPTER VI

### PAN-AMERICANISM

UNDER this general head we may consider the Pan-American movement proper, together with the attitude of the United States toward it, and also certain other phases of the relations between the United States and South American republics.

Pan-Americanism has been defined as "the movement designed to promote peace, security, trade relations, and general prosperity among the independent states of America."<sup>1</sup> For the furtherance of this movement, certain institutions have been created, including a series of international conferences and an agency known as the Pan-American Union. The member states are the twenty-one independent American republics. Canada, although at least semi-independent, is not a member, but there would seem to be no good reason why she should not become a member. Since the time of James G. Blaine the United States has taken a leading part in Pan-American activities.

Unlike such world-wide organs as the League of Nations and the Permanent Court of International Justice, the Pan-American Union is frankly regional in character.

Provided their purposes can be appropriately differentiated, there would seem to be room for the Pan-American system and for the World System to exist without necessary conflict. There is undoubted need for a universal association of nations to deal with matters of world-wide

<sup>1</sup>J. Fred Rippy, in *Encyclopaedia of the Social Sciences*, XI, 538. As he points out, the term Pan-Americanism is strictly a misnomer, and a more accurate name would be the American international movement, or multilateral diplomacy in America. *Ibid.*

interest. There are problems, however, that are sufficiently localized in some region of the world so that they can hardly be called world problems, and yet are of interest to a group of nations in that region. A League confined in its membership to the nations of such a region would be an appropriate agency for dealing with localized problems. The existence of such a League would not necessarily be inconsistent with the maintenance in full vigor of a world League for dealing with world problems.

The main connecting link between the members of the Pan-American Union is the fact that they are all situated in the Western Hemisphere, separated by the Atlantic Ocean from the rivalries and imperialism of Europe. As we have seen, the United States recognized the independence of the former Spanish-American colonies as early as 1822, and, through the promulgation of the Monroe Doctrine in the following year, we assisted in preventing European imperialistic activities from extending to the Americas in the same degree that they were extended to Asia and Africa. Thus the community of interest between the United States and the independent Latin-American republics consisted not only of geographical propinquity but also of the common aspiration to maintain democratic government in America, free from the domination of Europe.

The weakness of the Pan-American Union, however, consists in the fact that racially, culturally, and linguistically, the Latin-American countries are more closely connected with Europe than they are with the United States. Even geographically, some of the countries in the more remote parts of South America, such as Argentina, are closer to Europe than to the United States. Moreover, the ideals of law prevailing in the United States are derived from the Anglo-Saxon system of common law, while those prevailing in Latin America are derived from the Continental system of civil law. Another factor which has tended to

draw a line of cleavage between the United States and Latin America is that the United States is by far the strongest power in the Western Hemisphere, both in an economic and military or naval sense, and has unfortunately pursued an imperialistic policy toward its Latin-American neighbors. The latter naturally resent this attitude toward them on the part of the nation which they sometimes call the "colossus of the North."

The above influences have prevented as strong a Pan-American solidarity as might otherwise exist. Moreover, due in part to its closer cultural connections with Europe, Latin America has usually conducted trade with Europe on a larger scale than with the United States. This has also been due to the usually more energetic efforts of European nations to cultivate trade relations with Latin America and to the fact that the principal European countries have had a larger merchant marine than has the United States. Such trade relations between Latin America and Europe, however, are liable to be interrupted periodically on account of the war system in Europe. Thus, the outbreak of the World War in 1914 interfered seriously with the trade between the belligerents and Latin America, both because the productive capacity of the belligerents for export purposes was greatly curtailed and also because the ships necessary for the transportation of articles of trade were not available. This situation naturally opened to the United States, for the time being at least, greater opportunities of cultivating its trade relations with Latin America. More recently, Secretary of State Hull's policy of negotiating reciprocal trade agreements has been directed especially toward cultivating closer trade relations with Latin America. In this connection, it should also be remembered that, since the World War, large amounts of American capital have been invested abroad, and much of it in Latin America.

It is realized that better international relations and

closer coöperation between the United States and Latin America depend to a considerable extent upon improvement in the means of transportation and communication. In order to accomplish this end, various projects have been formed and brought at least partially to fruition, looking toward the establishment of ship lines, a Pan-American railway, a Pan-American highway, and airplane routes between the United States and Latin America. The accomplishment of this purpose would also have the practical advantage of promoting trade relations between North and South America.

#### THE ORGANS OF PAN-AMERICANISM

Although a so-called Pan-American Conference was held in Panama as early as 1826, to which the United States sent delegates, they did not arrive in time to participate in its deliberations. Their instructions, however, indicated that the United States at that time was ready to coöperate with Latin America to only a limited extent.

It was not until the time of James G. Blaine that the United States assumed an active part in Pan-American affairs. In 1889-1890 a conference was held in Washington, to which the Latin-American republics had been invited by the President of the United States, acting under authority of an act of Congress. Secretary of State Blaine presided over the conference and was the leader in the movement to have it called. His motive was to promote trade relations with Latin America, as well as to preserve inter-American peace through provision for arbitration of disputes.

The Conference of 1889-1890 was the first of a regular series of international conferences of American states. The second was held in Mexico City in 1901-1902, the third in Rio de Janeiro in 1906, the fourth in Buenos Aires in 1910, the fifth in Santiago, Chile, in 1923, the sixth in

Havana in 1928, and the seventh in Montevideo in 1933. The eighth is scheduled to be held in Lima, Peru, in 1938. These conferences provide a forum for the discussion of Pan-American affairs and are the most important and conspicuous organs of Pan-Americanism.

These conferences are primarily diplomatic assemblies. Consequently each country represented therein is entitled to one vote, regardless of the size of its delegation. Most matters, however, are decided by majority, rather than unanimous, vote. The acts of the conferences are usually in the form of conventions or treaties, which are subject to ratification by the member governments. The subjects dealt with are usually of a non-political character, but may have political implications. In addition to the regular conferences, which meet normally at five-year intervals, special conferences are also frequently called.

The secretariat of the Pan-American organization is the Pan-American Union, with a director general in charge of its activities. The Governing Board of the Pan-American Union is composed of representatives appointed by the member governments. The Board chooses its own president. The Secretary of State is the representative of the United States on the Board and is usually elected its president. Formerly, he was *ex officio* president and the representatives of the other states were their diplomatic representatives accredited to Washington. This enabled the United States to dominate the Board, since all its members were required to be at least *personae gratae* to our Government. Under this arrangement, if a particular Latin-American government was not recognized by the United States, it lost its representation on the Board. This situation aroused active opposition on the part of Latin-American governments, with the result that the system of membership on the Board was changed to the method of election. The representatives of Latin-American governments on the Board are still usually their diplomats

at Washington, but they may appoint others as their representatives if they prefer, or if they have no diplomatic representative at Washington, on account of lack of recognition by the United States, or otherwise. Each government thus enjoys membership in the union "as of right."

The central office of the Pan-American Union is located at Washington, where a handsome building has been provided for its use. The work of the Union is under the general supervision of the Governing Board, which appoints the director general. For meeting the expenses of the Union, each member government is assessed a quota, which is determined on the basis of population.

#### NATURE OF CONFERENCE PROCEEDINGS

The discussions and resolutions considered at Pan-American conferences usually relate to economic, social, scientific, and cultural matters, rather than to those of a political character. Nevertheless, consideration of political questions cannot be altogether avoided. At the first conference in 1889-1890, a proposal for a Pan-American customs union was made by Secretary of State Blaine, but was not adopted. The Latin-American nations were not willing to shut themselves off from economic relations with Europe, and to attempt to work out their economic welfare through complete coöperation with the United States. Such a proposal, although primarily economic in character, naturally had political implications. A recommendation was adopted by the conference, however, in favor of the negotiation of bilateral reciprocity treaties.

At the sixth Pan-American conference, held at Havana in 1928, Argentine proposed the adoption of a convention looking toward the reduction of high tariff rates, which unduly impeded trade between the members of the Pan-American Union. This proposal was defeated, however, through the opposition of the delegates representing the

United States Government, which at that time was dominated by the proponents of a high tariff policy. At the seventh conference held at Montevideo in 1933, however, the policy of our Government had changed, and Secretary of State Hull was successful in obtaining the unanimous adoption of a resolution providing for the reduction of excessive tariff rates through the negotiation of bilateral or multilateral reciprocity treaties. It is true that when President Franklin Roosevelt came into power in 1933, the high protective tariff was not lowered. He was not altogether uninfluenced by nationalistic considerations, and his primary interest was in domestic recovery. He clung to the high tariff, speaking generally, as a means of raising prices, which, in turn, was deemed to be a necessary means of overcoming the depression at home. But he supported the policy of Secretary Hull in lowering some rates through bilateral trade agreements on the basis of reciprocal tariff concessions.

Probably the most important cause which has operated to produce friction and misunderstanding between the United States and Latin America has been the policy which the United States has sometimes followed of intervening by force in the internal affairs of Latin-American states. It was almost inevitable that this matter should come up for discussion at Pan-American conferences. At the sixth conference of 1928, an effort was made by the delegates from the leading Latin-American states to secure the adoption of a resolution unqualifiedly denouncing intervention by one state in the internal affairs of another. With American marines then occupying Nicaragua, our Government could not consistently support the resolution. On the contrary, the delegates from the United States vigorously insisted upon the maintenance of the principle that a nation has duties as well as rights and its failure to observe such duties may, under certain circumstances, give to other nations the right of intervention. In other words, when-

ever, through the breakdown of government in Latin America, anarchy prevails and American lives and property are in danger, the United States must intervene to restore order. On account of our opposition, a decision on this matter was postponed. At the seventh conference in 1933, however, our Government was destined to reverse its attitude.

#### THE "GOOD NEIGHBOR" POLICY<sup>1</sup>

About midway the Hoover administration, however, there was a change of heart on our part, due no doubt in large part to realization that the world-wide economic depression, instead of being a mere temporary set-back in the march of prosperity, had assumed the proportions of a major disaster. The famous Hoover moratorium of 1931 on intergovernmental debt payments was the event which signalized the end of the era of *Machtpolitik*. It was at about that time that President Hoover and Secretary Stimson were led to the conclusion that the United States should as rapidly as possible lighten the load of our commitments in Latin America. Among the incidents showing the adoption of a policy in this direction were: (1) When a revolution occurred in Panama in 1931, the United States did not intervene, in spite of our right to do so under the treaty of 1903. (2) When El Salvador defaulted on her bonds in 1932, the United States State Department acquiesced and made no move to assist the bankers by establishing a customs receivership. (3) In Nicaragua, the number of American marines was gradually reduced and finally, early in 1933, those remaining were withdrawn altogether. (4) In 1934, our marines were withdrawn from Haiti; and (5) in a memorandum on the Monroe Doctrine prepared in 1930 by J. Reuben Clark, under-secretary of state in the Hoover Administration, the Roosevelt corollary

<sup>1</sup> Reprinted by permission from the author's article in *Am. Polit. Sci. Rev.*, October, 1935, pp. 805-820.



to the Doctrine was declared unwarranted and the Doctrine itself was characterized as a policy of the United States toward Europe and not toward Latin America.

In spite, however, of various steps taken by the Hoover Administration showing a more conciliatory spirit toward Latin America, one of the worst mistakes of the Hoover régime, namely, the Smoot-Hawley tariff act, still remained uncorrected at the end of the administration. This caused retaliation towards us throughout the world, including Latin America. Several countries seriously considered carrying on this economic warfare through the establishment of a South American customs union.

Although some progress had been made under President Hoover in the direction of a more conciliatory policy toward Latin America, President Franklin Roosevelt carried out this policy more fully and, in his official utterances, made it more clear-cut and explicit. In his first inaugural address, in 1933, he enunciated his policy of the good neighbor as follows:

“In the field of world policy, I would dedicate this nation to the policy of the good neighbor—the neighbor who resolutely respects himself and, because he does so, respects the rights of others—the neighbor who respects his obligations and respects the sanctity of his agreements in and with a world of neighbors. We now realize, as we have never realized before, our interdependence on each other; that we cannot merely take, but must give as well.”

This is an elaboration of the statement made many years earlier by Secretary John Hay that American foreign policy may be summed up in “the Monroe Doctrine and the Golden Rule.” It indicates a desire of the United States to treat other nations as we should like to be treated if our respective positions were reversed.

In his address on Pan-American Day in April, 1933, President Roosevelt declared:

“This celebration commemorates a movement based upon the policy of fraternal coöperation. Never has the significance of the words ‘good neighbor’ been so manifest in international relations. Never have the need and benefit of neighborly coöperation in every form of human activity been so evident as they are today. The essential qualities of Pan-Americanism must be the same as those which constitute a good neighbor, namely, mutual understanding and, through such understanding, a sympathetic appreciation of the other’s point of view. It is only in this manner that we can hope to build up a system of which confidence, friendship, and good-will are the corner-stones.”

In his appeal of May, 1933, to the nations of the world represented at the Disarmament Conference, the President called upon them to agree not to send an armed force of whatsoever nature across their frontiers.

The definite stand of the Roosevelt Administration against intervention in Latin America came in December of the same year. Secretary Hull, head of the American delegation at the Seventh Pan-American Conference at Montevideo, declared that “every observing person must by this time thoroughly understand that under the Roosevelt Administration the United States government is as much opposed as any other to interference with the freedom, the sovereignty, or other internal affairs or processes of the governments of other nations.”

Finally, in his address before the Woodrow Wilson Foundation at Washington on December 28, 1933, President Roosevelt declared explicitly:

“The definite policy of the United States from now on is one opposed to armed intervention. The maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States alone. The maintenance of law and the orderly processes of government in this hemisphere is the concern of each individual nation within its own borders first of all. It is only if and when the failure of orderly processes affects the other nations of the continent that it becomes their concern;

and the point to stress is that in such an event it becomes the joint concern of a whole continent in which we are all neighbors."

This statement represents a fundamental change in the application of the Monroe Doctrine as it had been understood since the time of Theodore Roosevelt. It adopts a continentalized interpretation of the Doctrine for the first time in an official presidential utterance. In this statement, President Franklin Roosevelt substituted the Soft Word for the Big Stick.

This suggestion that the Doctrine was now to be limited so that intervention, if it should take place, would be a coöperative and collective step brought a ready response from Latin America. Even Mexico, which, at the time it joined the League of Nations in 1931, refused to recognize the Monroe Doctrine, described in the Covenant as a regional understanding, approved the idea of making the Doctrine a joint policy of all the independent American states.

President Roosevelt not only declared against intervention, but carried out this new policy in practice. This was shown by his withdrawal of marines from Nicaragua and Haiti, by his refusal to intervene by force in Cuba, and by his termination of the Platt Amendment giving us the right to intervene in Cuba.

#### PAN-AMERICANISM AND THE LEAGUE OF NATIONS

A matter fraught with considerable possible embarrassment to the United States is that, in attempting to maintain a separate state system in the Western Hemisphere, we are confronted with the fact that most of the Latin American states are members of the League of Nations. The situation contains the seeds of possible rivalry between two systems, Pan-Americanism, with the United States at its head, and the world system, with the League of Nations at

its head, each bidding for the support of Latin America. Culturally, and in other ways, Latin American countries are, in general, more closely connected with Europe than with the United States. The League of Nations Assembly has served as a forum for the airing of a grievance, either real or fancied, of a Latin American state against the United States. The delegate of Panama in the Assembly of the League declared in the September, 1927, meeting of that body that the real sovereignty of the Canal Zone remained vested in Panama and had not been transferred to the United States. He further stated that unless the United States recognized this claim, the League of Nations should intervene and the controversy should be submitted for settlement to an impartial tribunal, presumably the World Court.

The view that the membership of Latin-American states in the League of Nations contained seeds of conflict between two state systems—the world system with headquarters at Geneva and the Pan-American system with headquarters at Washington—was expressed in 1924 by a well-informed American scholar, who declared that “there can be little doubt that the United States in its present mood will regard even the most peaceful interventions of the League of Nations as contrary to the Monroe Doctrine.”<sup>1</sup>

That the mood of the United States must have changed is indicated by developments in the Leticia and Chaco affairs. In the case of the Leticia dispute between Peru and Colombia, the League of Nations took jurisdiction of the dispute and formulated a plan of settlement. The United States wholeheartedly supported this plan, as shown by the fact that when the League authorized the appointment of a commission of three members to administer the disputed territory, a colonel of the United States army, by agreement with our government, served as a member.

<sup>1</sup> *Foreign Affairs*, March 1924, p. 387.

In reference to the conflict between Bolivia and Paraguay in the Chaco, the United States seemed to prefer to effect a settlement, if possible, through the joint action of neutral American states. Their efforts, however, did not meet with success. After Paraguay declared war, the League of Nations intervened and proposed a plan of settlement. As a non-member of the League, the United States declined to be represented on the League advisory committee on the Chaco conflict. When, however, the League sounded the United States as to our willingness to join with League members in imposing an embargo on arms and munitions to the belligerents, our government took the lead in adopting such a measure. The President placed an embargo on the sale of arms to both Bolivia and Paraguay under authority of a Congressional resolution, the passage of which he had recommended. Subsequently, however, when the League of Nations determined that Paraguay was the aggressor in the conflict and called upon the arms-manufacturing nations to raise the embargo on Bolivia so as to leave it on Paraguay alone, the United States declined to do so. It is true that the Administration had previously indicated its willingness in general to adopt such a course, provided the judgment of our government coincided with that of the League as to who the aggressor was; but this was dependent upon obtaining authority from Congress to do so, which was not given.

In the case of the Chaco affair, therefore, the United States did not coöperate as fully with the League as it did in the case of the Leticia affair. The United States may be, and has been, criticized for not coöperating with the League more fully. No doubt, full coöperation by the United States would have rendered League intervention in the Chaco affair more effective. But, in view of the previous history of our attitude toward the League, the remarkable feature of the case is not that the United States did not coöperate fully, but that it coöperated to the extent that it did.

## THE MONTEVIDEO CONFERENCE

One of the best examples of the policy of the United States in promoting international concord through the manifestation of the spirit of good-will occurred in 1933 in connection with our participation in the Seventh Pan-American Conference at Montevideo. The work of that conference exerted an important influence in cementing the friendly relations between the United States and the Latin-American countries. Among the tangible accomplishments of the conference was the adoption of a convention declaring that "no state has the right to intervene in the internal or external affairs of another." In supporting this convention, even with reservations, our delegation departed from the position which the United States government had maintained at the previous Pan-American conference in 1928.

This change in the position of our government, together with the friendly, sincere, and unassuming attitude of Secretary Hull, the head of our delegation, created a very favorable impression upon the delegates from the other states. It was largely due to Secretary Hull's efforts that no hostile *bloc* of Latin-American nations confronted the United States at the conference. Some persons have taken the position that international conferences are a delusion and a snare and that the United States should keep out of them. It is true that some conferences, such as the world economic and disarmament conferences, have seemed to be failures. Even the most pessimistic observer, however, must admit that the Montevideo Conference was a success.

## THE BUENOS AIRES CONFERENCE OF 1936

The official name of this extraordinary conference was the Inter-American Conference for the maintenance of Peace. Its background may be found in the demonstration

through the disastrous conflict between Bolivia and Paraguay over the Chaco that existing means for the preservation of peace in the Americas were not as effective as they should be. Moreover, the war-like clouds that hovered over the European horizon emphasized the need of protecting the Americas, as far as possible from the danger of a new world war.

In these circumstances, President Roosevelt, in January, 1936, sent personal letters to the presidents of the other American republics in which, after pointing out that peace between Bolivia and Paraguay had at last been restored, he declared that a propitious moment had arrived for the holding of an inter-American conference "to determine how the maintenance of peace among the American republics may best be safeguarded" and to "advance the cause of world peace." He suggested that the conference should meet at Buenos Aires. This message received favorable responses from all the other American presidents. The agenda for the conference was drawn up by a committee of representatives of all the twenty-one republics and unanimously adopted. The conference met at Buenos Aires in December, 1936, and the opening session was signalized by a personal visit of President Roosevelt, who received a great ovation when he delivered an address to the assembled delegates. In this address he called upon the American nations not only to prevent war in the Western Hemisphere but also to prevent the maintenance of those conditions that may lead to war. In this connection, he pointed out the importance of satisfactory commercial relations between nations. Without expressly mentioning the Monroe Doctrine he indicated his willingness to transform it into a multilateral policy, under which the republics would consult together in case of a threat of external aggression.

Pan-American solidarity, although highly lauded by conference orators, did not prove to be as close as the United

States desired. This was due to an unwillingness on the part of several Latin-American nations to follow the leadership of the United States in its attitude toward Europe and the League of Nations (of which they were members), and to friction between the United States and Argentina over trade matters. Nevertheless, the conference was able to achieve some solid accomplishments.

Among these accomplishments may be mentioned the convention for the maintenance of peace, which obligates the American republics to consult together for the preservation of peace, whether the danger arises from a threat of war between the American states or from an international war outside America. Such consultation should have the effect of rallying the forces of public opinion in favor of a peaceful solution. This convention thus definitely continentalizes the Monroe Doctrine and makes the maintenance of peace in the Americas the collective concern of all the American republics. Our delegation, in fact, proposed the creation of definite machinery of consultation, in the form of an Inter-American Consultative Committee, to be composed of the foreign ministers of the several republics. This suggestion, however, was defeated through the opposition of the Argentine delegation, which apparently regarded it as an attempt to create an American League of Nations.

Another accomplishment was the adoption of a convention to coördinate and assure the fulfillment of the existing peace treaties between the American states. Among these treaties are the Gondra Treaty of 1923, the Pact of Paris of 1928, the Inter-American Conciliation and Arbitration Treaties of 1929, and the Lamas Anti-War Treaty of 1933. Furthermore, the convention provided that, in case of a threat of war, the parties to the dispute shall not resort to hostilities for a period of six months, during which consultation on the part of the American republics may take place. If, in spite of all peaceful efforts, war breaks out



between any American republics, the signatories agree to "adopt in their character as neutrals a common and solidary attitude" and, by domestic legislation, to restrict the sale or shipment of arms and munitions and the granting of loans or credits to the belligerents. This, however, is to be "without detriment to their obligations derived from other treaties." In other words, states which are members of the League of Nations would not be expected to violate obligations under the Covenant of the League, such as that of discriminating against an aggressor. Suggestions were made at the Conference for the establishment of a League of American Nations and of an Inter-American Court of Justice, but these suggestions were either defeated or postponed by those who felt that they might either conflict with, or detract from the authority of, the world League of Nations and the Permanent Court of International Justice.

A protocol of non-intervention in the internal or external affairs of other states was also adopted, thus reaffirming the resolution adopted at the Montevideo Conference of 1933. In regard to trade, resolutions were adopted recommending the abolition of discriminatory trade practices and urging the reduction of artificial trade barriers. Finally, for the promotion of cultural relations, a plan was approved for the exchange of professors and students between the educational institutions of the various American countries.<sup>1</sup>

#### CONCLUSION

The new era of Pan-American relations was thus described by President Roosevelt in his address on Pan-American Day, 1937, before the governing board of the Pan-American Union:

<sup>1</sup>For a survey of the work of the Buenos Aires Conference, see Sumner Welles, "The New Era in Pan American Relations," *Foreign Affairs*, April, 1937, pp. 443-454; and C. G. Fenwick, "The Inter-American Conference for the Maintenance of Peace," *American Journal of International Law*, April, 1937, pp. 201-225.

“The nations of America mutually recognize their interdependence. They know today that the welfare and prosperity of each is largely dependent on the welfare and prosperity of all. By pursuing a policy of reciprocal concessions, in which the government of the United States is happy to have had a part, the nations of America have made important contributions to the healthy flow of trade and improved economic conditions.”<sup>1</sup>

Enough has now been said to show that, under the Roosevelt Administration, the attitude of the United States toward Latin America has undergone a fundamental change. This change is traceable to various causes, among the most important of which are: (1) the lack of danger of European intervention in Latin America; (2) the gradually increasing stability in Latin-American countries and their increasing ability on the whole to keep their own houses in order; (3) the effects of the economic depression in the United States and the need for this country to cultivate the good-will of Latin America as a stimulant to international trade; finally, and most important, (4) greater realization on the part of the United States of the right of Latin America to be allowed to work out its own destiny, without unnecessary interference by the United States.

Viewed from the standpoint of Pan-American Day, 1937, our relations with Latin America still showed very few relics of the old system of *Machtpolitik* which had not been entirely scrapped. For example, we have not yet given up our right of intervention in Panama, and on account of the need for defending the Canal, it may not be found feasible to do so. Moreover, we have not carried out the good neighbor policy with perfect consistency toward all the countries of the world. But, at any rate, our policy toward Latin America has recently been animated by a new spirit of mutual sympathy and coöperation. We have

<sup>1</sup> *New York Times*, April 15, 1937.

made an earnest and sincere effort to reconcile opposing interests and to cultivate mutual interests—an effort which, if persisted in, will assure a successful New Deal in our Latin-American relations. The greater friendliness and cordiality of Latin America toward the United States which is already noticeable augurs well for future peace and mutual helpfulness between these two great parts of the Western Hemisphere. With respect to Latin America, at least, the United States earnestly aspires to assume the rôle of leadership, not in the size of its army and navy, not in the imperialism and arrogance of its foreign policy, but rather in the far weightier matter of good-will and square-dealing among nations.

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## CHAPTER VII

### RELATIONS WITH THE FAR EAST

THERE are three main geographical sections of the world with which the United States has important relations. These are Europe, Latin America, and the Far East. In these various spheres the United States pursues distinct policies. In Latin America, especially in the Caribbean region, we have assumed a dominant rôle under the ægis of the Monroe Doctrine. Speaking broadly, and disregarding exceptions, our policy toward Europe has been one of isolation, while in the Far East it has been one of international coöperation.

The United States alone among the great nations of the world stretches entirely across a continent and faces on two oceans. Hitherto the Atlantic has been the more important of the two faces, but prophets are not lacking who predict that eventually the Pacific face will become predominant and that the great issues of the future will be fought out on the Pacific. Our interest in the region of the Pacific was of course greatly enhanced through our acquisition in 1898 of the Philippine, Hawaiian, and other islands in that Ocean. For decades before that date we had relations with the principal powers of the Far East—China and Japan—but with the acquisition of these dependencies in the Pacific, our interest in Far Eastern affairs became more definite and immediate.

#### THE UNITED STATES AND THE PHILIPPINES

The Far Eastern policy of the United States is closely connected with our possession of the Philippine Islands.

The acquisition of those islands was a mere incidental result of the Spanish-American War. The war was fought primarily with regard to Cuba, and most Americans probably did not even know where the Philippines were located. It happened, however, that the Philippines were also one of the dependencies of Spain and it was deemed good naval tactics by our Government to strike at the enemy in the Philippines as well as in the Caribbean. The full implications of this action do not seem to have been carefully thought out, and what was ostensibly a mere military manœuvre became the beginning of a series of events which fundamentally affected our foreign policy in the Far East. At the conclusion of the War, the question arose as to what disposition should be made of the Philippines. This question involved very largely the whole issue of imperialism, of either developing into a power with world-wide interests or of minding our own business and "tilling our own garden." The former alternative was finally adopted, the entire archipelago was acquired by the United States, and the pill was sugar-coated for Spain through the payment to her of \$20,000,000.

The final responsibility for the decision to acquire the archipelago must rest upon the shoulders of President McKinley. Various explanations have been given for his decision, and it is probable that his motives were complex. Among these was the fear that if the United States did not take the Philippines, Germany would do so and a world war might thereby be precipitated. Also, it was felt that the United States had assumed a responsibility toward the native Filipinos which we could not discharge if we got out of the Islands. Finally, President McKinley was probably influenced by the feeling that American trade in the Far East would be promoted by the acquisition of the Philippines. The great powers were engaged in a scramble for concessions and spheres of influence in China. Although the United States could not participate in this scramble,

it was felt that the acquisition of the Philippines would help to increase our trade in the Far East, not only in the Philippines themselves, but also by furnishing a base for the extension of our trade in China. Considerations against the acquisition of the Philippines, such as the inexperience of the United States in governing dependent peoples, the reflex influence upon our own polity which might be thereby caused, and the difficulty of defending territory so distant from our base of operations in case of a war among the great powers of the Far East, do not seem to have been given careful thought.

The relations between the United States and the Philippines after their acquisition is primarily a matter of domestic, rather than foreign, policy. Nevertheless, it may be pointed out that these relations show a growing feeling on the part of the American Government and people that our venture in the Philippines has not been profitable and should be liquidated as soon as practicable. We have therefore taken the unique step of proposing to grant the Philippines their freedom. As early as 1916 Congress passed the Jones Act which announced the policy of freeing the Philippines as soon as it appeared that they would be able to maintain an independent and stable government. This promise of ultimate freedom was, of course, very indefinite.

During the next fifteen years the debate proceeded intermittently as to making the project of Philippine independence more definite. Opposed to this project were Americans of the military and naval classes and American officials and residents in the Philippines. In favor of the project were certain economic interests in the United States, such as sugar and dairy producers, with whom Philippine products competed without paying duties. If the Philippines were free, tariff duties could be levied on their products entering the United States. Finally, in 1934, Congress passed the Tydings-McDuffie Act which was

approved by the President and accepted by the Philippine Legislature. In accordance with this act, the Philippines are to become an independent power on July 4, 1946. Unforeseen developments however, may bring about a change in this plan. The act makes provision as to the powers of the Philippine Government and as to its relations with the United States during the transitional period. A constitution for the Philippines was drawn up, approved by a vote of the people of the Islands, and the government under it was set up in 1935 as the Commonwealth of the Philippines. Although large powers are assigned to the Commonwealth government, the United States continues to exercise supreme authority over the Islands during the transitional period. More specifically the American Government exercises control over certain military and financial matters and over foreign relations. Amendments to the Philippine Constitution cannot be made if disapproved by the President of the United States. The latter appoints a High Commissioner to represent the United States in the Philippines. The United States Supreme Court has power of review of decisions of the insular courts. Although American military reservations are to be placed under the control of the Commonwealth government in 1946, the disposition of American naval bases is left to future determination. The United States retains the right to intervene to preserve the Commonwealth government and to maintain order in the Islands.

The most contentious question dealt with in the Tydings-McDuffie Act was that of trade relations. It was provided that, during the first part of the transitional period, certain quotas of Philippine products might be admitted to the United States without payment of duty, while imports beyond these quotas should pay full tariff rates. During the latter half of the period, an annually increasing percentage of the American rates will be levied on all Philip-

pine products entering the United States. During the whole period, however, American goods enter the Philippines free of duty. The Filipinos regard these provisions as hardly fair and likely to ruin their economic position. A movement has been started to secure a revision of the trade provisions of the Tydings-McDuffie Act, and possibly also to shorten the transitional period.

If and when the Philippines obtain their independence, legal control by the United States will cease, but the American Government can hardly absolve itself from all moral responsibility for the future of the Islands. The Act of Congress requests the President to negotiate as soon as practicable a treaty for the perpetual neutralization of the Islands. It is questionable, however, whether Japan would agree to such a treaty, especially if the United States retains naval bases in the Philippines. Thus far it appears that the United States is relying more on military and naval defense of the Islands than upon a neutralization treaty. In this connection it may be noted that, with the expiration of the Washington Naval Treaty at the end of 1936, the United States was left free to increase its fortifications and to establish new naval bases in the Philippines. Whatever the future holds in store, it remains true that the Philippine Independence Act of 1934 marks an important step in American foreign policy in the direction of withdrawal from imperialism.<sup>1</sup>

#### RELATIONS WITH CHINA AND JAPAN

It should be remembered that our relations with the principal countries of the Far East fall into two distinct and rather dissimilar phases: first, our dealings with China and Japan in the Far East, and, secondly, our treatment of Chinese and Japanese immigrants to the United States.

<sup>1</sup> Cf. D. H. Popper, "Creating a Philippine Commonwealth," *Foreign Policy Reports*, December 15, 1936.



For purposes of convenience, we may first consider the second of these phases.

#### CHINESE IMMIGRATION

Although insisting on the "open door" in the Far East, especially in China, the United States has undertaken to maintain the closed door against Oriental immigration, not only on our mainland but in our insular possessions in the Pacific. At first, however, no objection was interposed to the influx of Orientals into the United States. In fact, in the Burlingame Treaty of 1868 negotiated between the United States and China we find a provision which now makes curious reading to the effect that the two governments "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantages of the free emigration and immigration of their citizens and subjects respectively from one country to the other for purposes of curiosity, of trade, or as permanent residents." This was in harmony with the principle which we had insisted upon in our controversy with Great Britain over the impressment of American sailors into British service. When, however, the number of Chinese coolies coming to the United States started rapidly to increase, we began to doubt the universal validity of this principle. The feeling developed in this country, especially on the Pacific Coast, that Asiatic immigration presents a question of race and color which renders the problem of assimilation exceedingly difficult if not insurmountable.

Consequently, efforts were made to secure from Congress a law limiting Chinese immigration. Such a law was passed in 1878, but was vetoed by President Hayes on the ground that it was in conflict with the treaty of 1880. In 1882, however, a law was finally passed which received the President's approval. It prohibited all Chinese laborers, whether skilled or unskilled, from entering the United States for a

period of ten years. This law has since been extended and remains in force, so that only a few excepted classes of Chinese, such as students, merchants, and tourists, can come to the United States. Since this law violated the treaty of 1868, that treaty was later modified by another treaty so as to bring it into harmony with the law. The law of 1882 has been so effective that the number of Chinese in the United States has steadily dwindled at each decennial census, until at the present time there are only about half as many Chinese in the United States as there were at the time the law was passed. Moreover, the law has been extended so as to prohibit Chinese immigration, not only into the Philippines and Hawaiian Islands, but also from one archipelago to another or from either archipelago to the continental United States. The question of Chinese immigration, therefore, is no longer acute.

#### JAPANESE IMMIGRATION

The problem of Japanese immigration to the United States arose later than that of Chinese immigration, and at first was dealt with differently. Whereas Chinese immigration was met by an exclusion act of Congress, Japanese immigration was dealt with by the negotiation of a so-called "Gentlemen's Agreement" in 1907. This method was deemed more suitable in dealing with a proud and sensitive nation like Japan and was also more in accordance with our policy of general coöperation with Japan in the Pacific. Japanese immigration has, of course, affected the Pacific Coast states to a much greater extent than the rest of the country, and a divergence of view regarding the matter naturally sprang up between those states and the National Government at Washington. Agitation against the Japanese started on the Pacific Coast about 1900. In 1906 the school board of San Francisco passed an ordinance requiring all Japanese children to attend separate schools for

Oriental. This ordinance was protested against by Japan as in violation of a treaty existing between the two countries and was also strenuously opposed by President Roosevelt. The school board later repealed the ordinance.

The Gentlemen's Agreement of 1907 placed the control of Japanese immigration to the United States very largely in the hands of the Japanese Government itself. That Government agreed not to issue passports to Japanese laborers, skilled or unskilled, seeking to emigrate to continental United States unless they were former residents therein or were parents, wives, or minor children of residents. A treaty between the two countries signed in 1911 provided that "the citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel, and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Legislative enactments were soon passed in California which were protested against by Japan as being in violation of this treaty. By the statutes of the United States, only those aliens are eligible to become citizens by naturalization who can speak the English language and who are either white persons or persons of African descent. The Supreme Court of the United States has decided that Chinese and Japanese are not white persons within the meaning of this law; consequently, they cannot become citizens of the United States unless born on our soil. This exclusion of Orientals from citizenship by naturalization has been adopted by California as the basis of her anti-alien land laws. By her law of 1913 aliens ineligible to citizenship are prohibited from owning land for agricultural purposes, and

by another law of 1920 this prohibition was extended to the leasing of land. These laws have been upheld by the Supreme Court of the United States as not being in violation of the Constitution nor of the treaty of 1911 between the United States and Japan.

The operation of the Gentlemen's Agreement did not meet the desires of those who favored Japanese exclusion. Although the agreement doubtless had some effect in keeping down the number of Japanese immigrants, nevertheless the Japanese in the United States increased from about 72,000 in 1910 to about 111,000 in 1920. One cause of this increase was the issuance by Japan of passports to so-called "picture brides" to come to the United States to join Japanese men to whom they had been married by proxy in Japan. Since these marriages were legal under the law of Japan, the issuance of passports to picture brides came within the scope of the Gentlemen's Agreement. Japan agreed in 1920 to issue no more passports to picture brides, but the advocates of Japanese exclusion were not satisfied. They agitated in favor of the enactment of an exclusion law by Congress and were finally successful in 1924.

Shortly before the passage of the immigration act of 1924, President Coolidge and Secretary of State Hughes exerted their influence in attempting to prevent the insertion of an exclusion provision aimed especially at the Japanese. Mr. Hughes suggested that the quota plan, applied by the act to European immigrants, should also be applied to Japanese. In addition to a minimum allowance of one hundred for each country, the quota rule provided for the annual admission into the United States of two per cent of the number of each nationality who were in the United States in 1890. As applied to the Japanese, this rule would have allowed the admission of only two hundred and forty-six persons annually, in addition to the usual exempted classes. The application of this rule to the Japanese would have had the two-fold advantage that it would

have kept Japanese immigration down to a negligible quantity, while at the same time it would have constituted no discrimination against the Japanese. Congress, however, failed to adopt this sensible suggestion. Instead, the law as passed singles out aliens ineligible to citizenship and (with the exception of the usual exempted classes, such as professors, students, merchants, and tourists), prohibits their admission to the United States. Since Chinese and East Indians were already excluded by existing legislation, this provision of the law in reality applied solely to the Japanese. To them it gave unnecessary offense and endangered the salutary results of the Washington Conference of 1921-22 regarding the international situation in the Pacific and the Far East.

Why did Congress persist in passing a law which was opposed by the President and Secretary of State and had been opposed by several of their predecessors? Some influence in this direction was doubtless exerted by an unfortunate note addressed by the Japanese ambassador, Hanihara, to Secretary Hughes shortly before the passage of the act in which he adverted to the "grave consequences" which the act "would inevitably bring upon the otherwise happy and mutually advantageous relations between our two countries." Although, when the note was made public, the ambassador denied that it was intended to convey a veiled threat, it was so construed by several members of Congress, and it strengthened the forces of those favoring Japanese exclusion. Some members of Congress were also jealous of executive control over immigration and desired that Congress should exercise its constitutional power over the matter. Although the power of Congress over immigration is undoubted, that of the treaty-making power is equally so. President Coolidge indicated that he would have vetoed the provision excluding Japanese if it had stood alone, but in view of the recognized need for a law on the general subject, he was forced to sign the act. Here,

as in other instances, the foreign relations of the country suffered through a contest for power between the legislative and executive branches of the Government. From the standpoint of constitutional rights, both departments have power, but from the standpoint of expediency, executive control is likely to be preferable to legislative, since the latter embodies unilateral national action while the former is in harmony with the principle of international coöperation which we have usually followed in the Far East.

### THE OPEN DOOR

During the nineteenth century, the United States maintained trade relations with China and the importance of this trade slowly but steadily, and towards the end of the century rapidly, increased. The continuation of this trade was dependent upon the maintenance of the "open door," or equality of commercial opportunity. The idea of the open door was not new. It found expression in the most-favored-nation clause which was embodied in the treaty of 1844 between the United States and China. The principle of the open door, however, became especially important to the United States toward the close of the century. After the Sino-Japanese War of 1895, ending with the surprising defeat of China, it appeared to some observers that the Chinese Empire was about to break up. A scramble ensued among the powers to secure concessions, leased territories, and spheres of influence. This scramble was participated in by Great Britain, France, Russia, Germany, and Japan. It would have been entirely inconsistent with American principles and traditions to join in this race for special privileges. If the process of dismemberment of China continued, however, the principle of the open door, and with it American trade, would be largely destroyed. One reason why we retained the Philippine archipelago in 1898 was doubtless in order to have a convenient base for the exten-

sion of American trade and the protection of American interests in the Far East. This would not be of much avail, however, if China were divided up among the powers into closed spheres.

At this juncture, Secretary John Hay took the step by which, more than by anything else, he is remembered. In September, 1899, he dispatched a circular note to Great Britain, France, Germany, Russia, Japan, and Italy expressing the views of the United States regarding the situation in China and requesting that those governments indicate their approval of a statement of principles set forth therein. These principles were as follows: (1) that each power would undertake not to interfere with any treaty port or vested interests within its sphere of influence; (2) that duties on goods within the sphere should be fixed by the Chinese tariff and should be levied and collected by Chinese officials; and (3) that each power would undertake not to levy higher port dues or harbor charges on other foreign vessels than on those of its nationals, and that railroad rates within its sphere for the shipment of merchandise should be the same to all shippers. These principles were intended to enforce the equal commercial rights of the United States under the most-favored-nation clause of early treaties, which legally applied uniformly throughout the Empire; to place the trade of the various nations upon a basis of equal opportunity; and to prevent discrimination against the United States which would otherwise be practiced in the various spheres.

Secretary Hay's circular note caught the powers in a delicate situation. They could not refuse acquiescence with the principles laid down without openly avowing the essentially selfish character of the enterprises in which they were engaged. The moral position of the United States, on the other hand, was strong because, although the general recognition of the principles laid down would be in accord with our commercial interests, it would also promote the inter-

ests of China. Our position, therefore, might be construed as partly altruistic. The responses of the powers were on the whole favorable. That of Great Britain was the most prompt and favorable, while that of Russia was the least favorable. In her reply, Russia made no mention of port dues or railroad rates. In most cases, reservations or qualifications of complete acceptance were indicated. Nevertheless, in March, 1900, Secretary Hay informed the powers that their acceptance of the American proposals was regarded by the United States Government as final and conclusive.

Meanwhile, among the Chinese there had been growing a deep feeling of resentment against foreigners who threatened the dismemberment of their Empire and against the Imperial Government itself for weakly acquiescing in the situation. This movement was led by a society known as the "Boxers," or the Order of the Sacred Fist. It desired to secure the expulsion of foreigners, especially missionaries, merchants, and public officers. They were opposed to the missionaries because their teachings struck a blow at ancestor worship. They detested foreigners who were guilty of the sacrilege of constructing railroads through the graves of their ancestors, and they hated foreign officers because they were the visible symbols of the spheres of influence which foreign powers had acquired.

Spurred on by these grievances, the Boxers moved against Peking and attacked the legations of the foreign powers. Under these circumstances the United States joined with the other powers in dispatching troops into the interior in order to rescue the besieged legations. By international law, diplomatic representatives and their residences are inviolable, and since the Imperial Government of China seemed unable to protect them, joint international intervention for this purpose was justifiable. In co-operating with the powers in this joint military enterprise, the United States was not making war on China but was



helping the Chinese Government to put down an insurrection within its borders.

The United States joined with the powers not only in the military expedition but also in the negotiations for a settlement after the Boxer Rebellion had been put down. We joined in demanding an indemnity, the punishment of the chief offenders, and the restoration of order, but our influence was exerted in behalf of moderation. We declined to assent to the exaction from China of such an oppressive indemnity as would have the effect of making her a fiscal vassal for an indefinite period of time. Nevertheless, by the protocol signed in 1901, China was required to pay to the powers an indemnity of about \$330,000,000, of which the share of the United States was about \$24,000,000. The latter sum was really much greater than the amount of our losses and the cost of sending American troops into the interior. Consequently, in 1908, Congress, in accordance with the recommendation of President Roosevelt, authorized the return to China of the excess, amounting to about \$13,000,000. China showed her appreciation of this action by setting aside this sum as a fund to be used in sending Chinese students to American universities.

In July, 1900, after the suppression of the Boxer Rebellion, Secretary Hay dispatched a second note to the powers defining the position of the United States in view of the unsettled situation in China and the possibility that retaliatory measures taken by the powers in that unhappy country might endanger the principle of the open door. In concluding his note, he said:

“The policy of the Government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative integrity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.”

Thus, this note sought to preserve not only the open door but also the integrity of China. Although this principle was adopted by the powers as the basis of the settlement made with China, nevertheless spheres of influence and the scramble for concessions and special privileges were by no means abandoned. The actions of the powers did not in all cases square with the lip worship which they had given to the enlightened principles laid down by the United States. There were certain natural limitations upon the applicability of the open door principle. There could hardly be equal opportunity for concessions as far as railroads and other natural monopolies were concerned, where competition is in the nature of things impracticable. Moreover, differences of opinion among the powers as to the application of the open door principle were bound to arise, for the settlement of which no convenient method existed. Nevertheless, various developments following the settlement of the Boxer troubles cast doubt upon the sincerity of the powers' support of the principle of equal opportunity.

The worst offender was Russia, whose continued military occupation of Manchuria was hardly compatible with the maintenance of the open door in that part of China. This occupation was especially obnoxious to Japan, who demanded that Russia should recognize that Manchuria and Korea were outside her sphere of influence and that the treaty rights of other powers in Manchuria should be recognized. When Russia paid no attention to these demands, Japan in 1904 declared war on her. Belligerent operations were to some extent localized at the request of the United States Government. The result of the war was a victory for Japan, but the treaty of peace negotiated at Portsmouth, New Hampshire, in 1905 was not such a sweeping triumph for her. Nevertheless, by the terms of peace the Russian leases of Port Arthur and adjacent territories and waters and the South Manchuria Railway were transferred to Japan.

Subsequently, Japan undertook to exercise an exclusive right of administration in the territory adjacent to the railway, which seemed to our Government to be a violation of the open door policy. In order to bring about some improvement in this situation, our Government succeeded in negotiating with Japan the Root-Takahira agreement of 1908, by which the two powers agreed (1) to preserve the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire; (2) to respect each other's territorial possessions in the region of the Pacific; (3) to maintain the existing status quo in that region; and (4) in the event of any threat to these principles, to consult together as to what measures they might consider it useful to take. This agreement was intended by our Government to show that the United States was still interested in the Far East and that our attitude toward the principle of the open door and the integrity of China remained unchanged.

Again, in 1917, by the Lansing-Ishii agreement, the United States and Japan reiterated their support of the principles of Chinese independence and territorial integrity and of the open door or equal opportunity for commerce and industry in China. This agreement, however, contained a recognition by the United States of a sort of Monroe Doctrine for Japan. It declared that "territorial propinquity creates special relations between countries, and, consequently, the Government of the United States recognizes that Japan has special interests in China, particularly in the part to which her possessions are contiguous." This agreement was made after the entrance of the United States into the World War, and the concession to Japan which it contained was probably intended to help hold Japan to the allied cause.

By the Nine Power Treaty negotiated at the Washington Conference in 1922, the territorial and administrative integrity of China and the principle of equal opportunity

for the commerce and industry of all nations throughout the territory of China are defined and for the first time recognized in a general international treaty. In this treaty China also for the first time bound herself to observe the principle of the open door. This principle, therefore, has now become an international policy instead of a merely American policy, and the responsibility for its enforcement rests not on the United States alone but on all nine powers signatory to the treaty. By a resolution adopted by these nine powers at the Conference, provision was made for the establishment in China of a board of reference, to which any questions arising in connection with the execution of the open door principle might be referred for investigation and report. The board, however, was never established.

The open door principle, if impartially applied in all the nominally independent but backward countries of the world, would constitute an important contributing factor toward world peace, since it would tend to keep within bounds the operation of the forces of economic rivalry in such regions, which is one of the causes of war. The open door principle in reference to tariff charges, port dues, and railroad rates, is comparatively simple of application. As applied to concessions and investments, however, it is more difficult to enforce. This difficulty may doubtless be largely overcome through the adoption of the plan of international coöperation. Such a plan was embodied in Secretary Knox's proposal of 1910 for the "neutralization" of the Manchurian railways through their purchase with funds supplied by an international loan to China and through their administration by a joint commission of the powers participating in the loan. This proposal was not adopted, however, on account of the opposition of both Russia and Japan.

The plan of international coöperation was again embodied in the Six Power Consortium of 1912, composed of American, British, French, German, Russian, and Japanese

bankers, who proposed to make an international loan to the young Chinese Republic, which had been proclaimed in 1911. As conditions of the loan it was laid down that the expenditure of the funds provided should be supervised by the syndicate, that taxes hypothecated to insure repayment of the loan should be administered under foreign direction, and that China was not to borrow elsewhere. The participation of American bankers in this consortium had the support of the Taft Administration. This support was in furtherance of the policy of "dollar diplomacy" in which President Taft's Secretary of State, Mr. Knox, was a firm believer.

In 1913, however, when the Wilson Administration came into power, support for the project from our Government was no longer forthcoming. President Wilson declared that his Administration "did not approve the conditions of the loan or the implications of responsibility on its own part" which American participation in the Consortium involved. In view of the unfavorable attitude of the Administration, the bankers allowed the project to drop. In 1920, however, the Administration reversed its position. In that year a second China Consortium was formed by banking interests representing the United States, Great Britain, France, and Japan, with the full support of our Government. The State Department pledged the willingness of the Government "to aid in every possible way, and to make prompt and vigorous representations, and to take every possible step to insure the execution of equitable contracts made in good faith by American citizens in foreign lands." This pledge was made on the condition that the bankers would coöperate with the Department by following the policies laid down by it. The bankers' agreement was to extend for a period of five years and therefore expired in 1925, without having accomplished the purpose in view, on account of unsettled conditions in China.

## EXTRATERRITORIALITY

The term "extraterritoriality" is used to indicate the exemption of certain persons from the jurisdiction of local authorities and from the operation of local laws. Since it is a limitation upon the otherwise complete control of the independent country in which it exists, in the case of private citizens it can be established only on the basis of express treaty provision. The earliest treaty in which rights of extraterritoriality were accorded to American citizens by a Far Eastern country was that of 1844 between the United States and China. The definite statement of the right as found in that treaty is as follows:

"Subjects of China who may be guilty of any criminal act toward citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China; and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the consul, or other public functionary of the United States, thereto authorized, according to the laws of the United States . . . All questions in regard to rights, whether of property, or person, arising between citizens of the United States in China, shall be subject to the jurisdiction of, and regulated by, the authorities of their own government. And all controversies occurring in China between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China."

A treaty extending to American citizens in Japan similar privileges was made with that country in 1857. The treaties with China and Japan were not forced upon those countries, but were made in order to assist them in dealing with foreigners. Legislation has been enacted by Congress to carry out the provisions of these and similar treaties

with several other countries. Such legislation regulates the judicial powers and functions with which American consuls are invested, and indicates the law which they are to administer in consular courts.

In 1899 the extraterritorial jurisdiction of American consuls over the offenses of American citizens in Japan was terminated at the expiration of the five-year period specified in the treaty of 1894. Our Government had indicated as early as 1878 its willingness to relinquish this right as soon as other powers should do likewise. The United States, however, still retains its rights of extraterritoriality in China. Many Chinese regard the continued existence of this right as a badge of inferiority and as inconsistent with the sovereignty and independence of their country. We admit that there is much force in this argument and that the exercise of this right in China is a temporary expedient designed to bridge over the period which will elapse before a system of administration of justice approaching Western standards can be established in that country. As early as 1903 our Government had indicated a willingness to relinquish this right in China as soon as the state of Chinese laws and judicial administration should warrant such action.

The Chinese delegates to the Paris Conference of 1919 and the Washington Conference of 1921-22 protested against the continuation of the right of extraterritoriality in China. They argued, in the first place, that the Chinese system of law and courts had been thoroughly reformed and, in the second place, that the administration of the existing system of extraterritorial jurisdiction reveals certain glaring defects. There is a diversity of law arising from the operation of the consular courts of the several powers. This leads, it is claimed, to uncertainty in the administration of justice. Moreover, it is claimed that the officers designated to preside over consular courts are frequently not well trained in the law or in the methods of

administering justice. The Chinese delegates therefore pleaded that the system of extraterritorial jurisdiction should be gradually abandoned.

At the Washington Conference a resolution was adopted by all eight states represented (besides China) providing for the establishment of a joint commission to investigate the practice of extraterritoriality in China and also the local administration of justice in that country, with power to make recommendations for the reform of existing conditions. It was agreed that a representative of China should sit on the commission, without, however, committing China to the acceptance of its report. The commission, of which the American member, Mr. Silas Strawn, was selected chairman, met at Peking in January, 1926. Shortly before its meeting, Secretary Kellogg issued the following statement:

“I have every hope that the aspirations of China to regain the control over her tariffs and to establish the jurisdiction of her courts over foreigners living within her borders will be worked out . . . I believe the time has passed when nations capable of maintaining self-government can be expected to permit foreign control and domination. Nevertheless, one of the difficulties with which foreign countries have to deal in the case of China is the instability of its government and the constant warfare between various contending factions.”

The report of the commission was made in September, 1926. It found certain defects in the existing practice of extraterritoriality which it suggested should be remedied. With respect to the Chinese system of courts and judicial administration, it found them seriously defective. This situation is due, the report holds, to the lack of a dominant central government, to the operations of military leaders who assume to exercise judicial, as well as all other, powers of government, and to the lack of adequate financial support for the proper maintenance of the courts. The report did



not favor the immediate abolition of extraterritoriality, but suggested that as necessary reforms in the Chinese system of judicial jurisdiction are made, the right of extraterritorial jurisdiction may be gradually relinquished. It is therefore incumbent upon the Chinese to do something in a positive way for the improvement of their own system before they can expect the powers to renounce their rights.

Since the rights of extraterritoriality are based on treaty, they can legally be renounced only through the making of new treaties which supersede the earlier unequal ones. The United States Government, desirous of adopting a liberal attitude toward Chinese nationalistic aspirations, has indicated a willingness to enter into negotiations for the modification of these treaties. Since the treaties affect the whole of China, they can only be modified through the negotiation of new treaties with representatives who are authorized to speak for the whole of China.

On December 28, 1929, the Nationalist Government of China issued a mandate declaring that "for the purpose of restoring her inherent jurisdictional sovereignty, it is hereby decided and declared that on and after (January 1, 1930) all foreign nationals in the territory of China who are now enjoying extraterritorial privileges shall abide by the laws, ordinances, and regulations duly promulgated by the central and local governments of China." This declaration appeared on its face to be an attempt on the part of the Chinese Government to terminate by unilateral action the treaties on which the right of extraterritoriality is based. Further consideration, however, showed that this move was merely an attempt of the Chinese Government to hasten diplomatic conversations with the powers looking toward the termination of the right. The United States and Great Britain let it be understood that they were willing to consider January 1, 1930 as the date from which the process of gradual abolition of extraterritoriality "should be regarded as having commenced in principle." It was

not expected, however, that actual abolition of consular jurisdiction would take place except by gradual stages, *pari passu* with improvements in the Chinese system of the administration of justice.

#### RELATIONS WITH JAPAN

During the nineteenth century, the relations between the United States and Japan were traditionally and almost uniformly friendly. We regarded Japan as almost a protégé of ours because it was through the expedition of the American Commodore, Perry, in 1854 that Japan was opened to intercourse with the rest of the world.

The first important rift in the harmonious relations between the two countries came in 1898 with the acquisition by the United States of territorial possessions in the Pacific Ocean. This was especially true in the case of our annexation of the Hawaiian Islands. Japan, a densely overpopulated country, regarded these Islands as a promising field for Japanese immigration and expansion. She could not hide her vexation when they were annexed by us, and entered a protest on the ground that this acquisition would (1) interfere with the cordiality of the relations among the powers having interests in the Pacific, and (2) jeopardize the status of Japanese residing in the islands and possibly interfere with the settlement of various claims held by Japan against Hawaii. In reply, our Government denied that the annexation would have the untoward results described and pointed out that no protest had been made during the several years while the movement towards annexation was on foot.

With reference to our acquisition of the Philippines, Japan made no protest, although she doubtless looked with regret upon the transfer of these islands from a weak to a strong power. One argument sometimes heard against the grant by the United States of independence to the Philip-

piners is that, if we did so, they would fall a prey to Japan. The desire of Japan for these islands, however, has probably been overestimated. They are already thickly populated and their climate is not very suitable for Japanese immigration.

The coolness between the United States and Japan really dates from the Treaty of Portsmouth made in 1905 at the conclusion of the Russo-Japanese War. At the request of the Emperor of Japan, President Roosevelt intervened and succeeded in inducing the warring powers to send commissioners to Portsmouth, New Hampshire, to negotiate the terms of peace. Japan had been surprisingly victorious on the field of battle, but was nevertheless getting close to the end of her resources. Consequently, when the demand of her commissioners for a large indemnity was refused by Russia, they abandoned this claim, upon the advice of President Roosevelt. The Japanese people, not knowing the critical posture of their military fortunes, believed that they had been cheated of the fruits of victory by the terms of the treaty and blamed President Roosevelt for the diplomatic defeat of their commissioners. The feeling against the United States was accentuated by the troubles over Japanese immigration in California, already described, which shortly followed.

The outbreak of the World War gave Japan the opportunity which she coveted to extend her influence in the Far East. She expelled Germany from Kiao-Chau in 1914 and assumed control of all German interests in the Shantung peninsula. In 1915 she presented to China the Twenty-one Demands, the grant of which would insure Japanese control over certain important provinces of China. Being unable to resist and without help from the United States or other powers, China was forced to sign the demands. After they were signed, the United States sent identic notes to Japan and China declaring our refusal to recognize any agreement between the two countries "impairing the treaty

rights of the United States and its citizens in China, the political or territorial integrity of the Republic of China, or the international policy, commonly known as the open door policy." In spite of our protest, the Twenty-one Demands had seriously impaired the independence of China.

In 1918, a joint military expedition into Siberia was undertaken by Japan, the United States, Great Britain, and France. Japan sent a much larger force than did any of the other powers and, in violation of her agreement, continued to maintain her forces there after the other powers had withdrawn. At the Peace Conference in Paris in 1919, Japan demanded that her control over the former German interests in Shantung province should be definitely confirmed. President Wilson declined to agree to this, but since the allied powers by secret agreements had promised them to Japan, he was forced to acquiesce in the temporary occupation of the province by Japan in return for her promise of ultimate evacuation. The Supreme Council of the Allies at Paris also undertook to confer upon Japan a mandate over the former German islands in the Pacific north of the equator. Among these was the Island of Yap, an important cable station lying midway between Guam and the Philippines. The United States declined to acquiesce fully in this arrangement, holding that since the common victory over Germany had been "shared by the United States, there could be no valid or effective disposition of the overseas possessions of Germany without the assent of the United States." This and other unsettled questions relating to the Far East were left for final determination at the Washington Conference of 1921-22.

#### THE WASHINGTON CONFERENCE

This conference was called primarily to consider the question of limitation of armaments, but since it could not

be expected that agreement on this question would be reached unless some settlement were made regarding certain acute outstanding problems of international politics, matters relating to the Pacific and Far East were also placed on the agenda. The Conference was on the whole a very successful one and was able to effect agreements regarding several unsettled matters. These agreements are embodied in a series of treaties and resolutions. At the insistence of Japan, the agreements are not retroactive.

Regarding the dispute about the island of Yap, an agreement was effected whereby Japan concedes to the United States cable and certain other rights in the island. It was also provided that Japan as the mandatory power under the League of Nations should send annual reports to the United States as well as to the League. This concession forms a precedent on which the United States may base claims regarding other mandated possessions formerly owned by Germany. Agreement was also reached for the return of Shantung by Japan to China. Subsequently Japan also withdrew her troops from Siberia. These concessions by Japan eased the situation by removing some of the causes of international complaint against her.

Probably the most important concession made by Japan, however, was the insertion in the Four Power Treaty of a provision expressly terminating her long-standing alliance with Great Britain. The United States felt that the effects of this alliance in the Far East had for some time been unfortunate and was glad to see it ended. In order to save the face of Japan, however, there was substituted for the Anglo-Japanese alliance a four-power entente in the Pacific, to which Great Britain, Japan, the United States, and France are parties; the latter power being added in order not to let it appear that the United States had merely been drawn into the former alliance. The Four Power Treaty extends for ten years and is an undertaking among the parties to respect their rights pertaining to their insular

possessions in the Pacific. It does not, however, apply to the Japanese mainland. It provides for the holding of a joint conference to adjust any disputes that may arise between the contracting parties, and for consultation together in case their rights are threatened by the aggressive action of any other power. When this treaty came before the United States Senate for approval, it was vigorously attacked and criticised as being an entangling alliance, but was finally approved.

The real compensation given Japan in return for the termination of the British alliance was the agreement of the Naval Treaty whereby the United States, Great Britain, and Japan undertake to maintain the status quo at the time of the signing of the treaty with regard to fortifications and naval bases in certain of their insular possessions in the Pacific. As far as the United States is concerned, this means that during the fifteen years while the agreement is in force, we will not increase our fortifications or establish new naval bases in Guam and the Philippines. The discretion of Congress in determining the extent of certain national defenses is thus limited by the treaty power. The agreement is a virtual recognition of the supremacy of Japan in the Northwestern part of the Pacific Ocean. This gives her a sort of "Caribbean region" of her own in that quarter of the globe.

The nine powers represented at the Conference entered into two treaties affecting the situation in China: one, already described, carefully redefining and confirming the principle of the open door, and the other relating to the vexed question of Chinese tariffs. An important ground of complaint by China was that she did not control her own tariff rates and administration. Under treaties with foreign powers, the rates have been kept down to a maximum of five per cent *ad valorem*, and under the system of valuation the rates have really been considerably lower than this. The treaties also placed the customs administration in the

hands of foreigners, and the proceeds were usually hypothecated to pay the interest on foreign loans. These restrictions were attacked by the Chinese delegates to the Washington Conference as being an infringement upon the sovereignty of China and as involving a great loss to the Chinese treasury. As opposed to these arguments, the representatives of the powers pointed out the lack of a strong central government in China and raised objection to the local taxes on goods in transit in China, levied by provincial governors and known as *likin*.

The Nine Power Treaty, as finally drawn up, provided for the revision of tariff valuations so as to make the five per cent effective. An international tariff revision commission composed of representatives of the powers, it was provided, should meet at Shanghai as soon as possible, to effect the revision. In order to increase her revenue, China was allowed to levy a surtax on luxuries. It was also agreed that a tariff conference should be held at Peking within three months after the ratification of the treaty. This occurred on August 6, 1925, and the Conference soon after assembled as scheduled. It adopted a resolution recognizing the right of China to enjoy tariff autonomy. The powers represented, including the United States, consented to the putting into effect in 1929 of a Chinese national tariff law, on condition that China should by that time abolish *likin*. The impotence of the central government in China, however, practically nullified the results of the conference.

The treaties adopted at the Washington Conference were based on the principle of international equality in the Far East, in regard both to custom duties and to commercial opportunities. This was inconsistent with the idea of special privileges and interests. Consequently, on April 14, 1923, by exchange of identic notes between Secretary Hughes and the Japanese ambassador, the Lansing-Ishii agreement of 1917 was terminated.

The interest of the United States in China differs from

that of the other Western powers and Japan because we have no concessions, spheres of influence, or leased territory. The only interest of the United States in China, as Secretary Kellogg declared in the statement mentioned above, is that American citizens "be given equal opportunity with the citizens of the other powers to reside in China and to pursue their legitimate occupations without special privilege, monopolies, or spheres of influence." The United States has endeavored, during recent years, to maintain its traditional friendly attitude toward China in spite of the unsettled conditions there.

#### THE UNITED STATES AND THE MANCHURIAN AFFAIR

In 1931, while the Western powers were in the throes of a great economic depression, Japan seized the opportunity of invading Manchuria. By the Nine Power Treaty of 1922, the signatory parties, including the United States and Japan, agreed to respect the territorial and administrative integrity of China. The military penetration of Manchuria by Japan in 1931 seemed on its face to be in violation of this undertaking. The Nine Power Treaty provides that, whenever a situation arises involving, in the opinion of any of the signatory parties, the application of the treaty, "there shall be full and frank communication between the contracting powers concerned." By the Kellogg-Briand Pact of 1928, the parties, including Japan, agreed not to settle their international disputes except by peaceful means. The terms used in the Pact were not defined, nor were any means of enforcement expressly indicated.

At the time of the military invasion of Manchuria by Japan in apparent derogation of the Nine Power Treaty, neither the United States nor Japan elected to resort to the "full and frank communication between the contracting powers" stipulated therein. They dealt with the situation



rather through the machinery of the League of Nations. The United States coöperated with the League organs in endeavoring to work out a solution of the difficulty. This attempt, however, did not meet with success.

Both the League and the United States were accused of weakness in dealing with the Manchurian affair. It should be pointed out, however, that Japan may defend her course on either of two grounds. If she was waging war in China, she could maintain that it was a war of defense which is not prohibited by the Kellogg Pact. On the other hand, she might maintain that her action in Manchuria was not war but intervention, such as has frequently been carried out by strong nations in weak, backward and disorganized countries. Furthermore, if it should be inquired why the League did not invoke the application of a boycott or economic sanctions against Japan, it should be remembered that such a policy would be ineffective without the coöperation of the United States, which did not indicate its willingness to coöperate with the League in that respect. As President Hoover pointed out in his message to Congress in December, 1931: "In all negotiations, the department of state has maintained complete freedom of judgment and action as to participation in any measure which the League might finally determine upon."

#### THE DOCTRINE OF NON-RECOGNITION

On January 7, 1932, the United States adopted a more independent attitude and policy in the communication addressed by Secretary of State Stimson to the Chinese and Japanese Governments. In this note it was declared that the United States

"cannot admit the legality of any situation *de facto*, nor does it intend to recognize any treaty or agreement entered into between those governments, or agents thereof, which may impair the treaty rights of the United States or its

citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the open door policy; and it does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris."

In other words, the United States refused to recognize the results of any situation brought about in violation of either the Nine Power Treaty or of the Kellogg-Briand Pact. In this respect we took a more advanced position than had then been taken by the League of Nations or by any other government.

Unless the United States is humbly to acquiesce in any new situation brought about abroad by violent means in derogation of our rights under treaty or international law, there are three possible courses of action that may be pursued by us short of going to war. In the first place, we may declare one of the combatants to be the aggressor and break off diplomatic relations with her. In the second place, we may declare an economic boycott against her. Both of these courses may lead to war and are also objectionable on other grounds. In many cases it is very difficult to determine who is the aggressor, for no entirely satisfactory definition of the aggressor has yet been formulated. Moreover, an economic boycott would tend to aggravate the evils of high tariffs, would injure the boycotter as well as the boycotted nation, and would still further depress the low state of international trade. Moreover, it is especially hard on non-combatant women and children and is likely to be considered an act of war. Furthermore, experience has demonstrated that "war to end war" is futile.

The third possible course is to refuse to recognize the results of warlike action, whether they be territorial gains or other spoils of war. This course evades the difficulty of

defining the aggressor, but instead, defines the victor. This simplifies matters, for there is usually little doubt as to who is the victor. This third course was the one adopted by Mr. Stimson in his statement of January 7, 1932.

In regard to the Far Eastern conflict the League of Nations had adopted a rather hesitating and vacillating policy. Its principal members, Great Britain and France, were apparently loath to take any action which might offend Japan and they were therefore willing to allow the United States to take the lead in defending the international peace machinery against the aggressive tactics of Japan. In February, 1932, however, the twelve members of the League Council, aside from the representatives of Japan and China, sent a note to Japan calling her attention to Article X of the League Covenant and declaring that no territorial infringement in violation of that article ought to be recognized by the members of the League of Nations. On March 11, 1932 the League Assembly adopted a resolution declaring "that it is incumbent upon the members of the League not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris." Thus a majority of the members of both organs of the League adopted the American doctrine or policy with reference to the Far Eastern situation.

The United States and the League thus joined hands in presenting a united front in support of the principle contained in Article X, a provision which President Wilson once declared to be the very heart of the Covenant. Although this position was taken with special reference to the Far Eastern situation, it is capable of more general application and, as Secretary Stimson stated, places a caveat upon aggressive action in violation of treaties which "will effectively bar the legality hereafter of any title or right sought to be obtained" by such action. In accordance with this principle, the United States and the other

nations, with the exception of Japan and one or two others, refused to recognize the puppet state of Manchukuo created by Japan in Manchuria. This course was pursued by the United States while maintaining diplomatic relations with Japan.

A boycott of Japanese goods became widespread in China, which struck a blow at Japanese industrial activity. Early in 1932, Japan retaliated by landing a large force at Shanghai. The Chinese resisted stubbornly with considerable loss of life and property. This attack by Japan led to a restatement of American policy by Secretary Stimson, in a letter of February 24, 1932 to Senator Borah, chairman of the Senate Committee of Foreign Relations, stating that the treaties adopted at the Washington Conference "were interrelated and interdependent. . . . The willingness of the American Government to surrender its then commanding lead in battleship construction and to leave its position in Guam and the Philippines without further fortification was predicated upon, among other things, the self-denying covenants contained in the Nine-Power Treaty."

In an effort to reach a settlement of the controversy between China and Japan, an international commission was appointed under the auspices of the League of Nations with Lord Lytton of England as its head and Major-General McCoy of the United States Army as one of its members. Although General McCoy served with the acquiescence of the American Government, it was declared that he did not officially represent it. Before the Lytton Commission made public its report, Japan recognized the puppet state of Manchukuo as independent and entered into treaty relations with her. When the report of the Commission was finally published in October, 1932, it was found to condemn the aggressive tactics of Japan but did not leave China entirely blameless. The report justified the non-recognition policy of the United States in holding that the occupation of Manchuria by Japan was contrary

to existing obligations. The report further declared that "the maintenance of the present régime in Manchuria . . . does not appeal to us as compatible with the fundamental principle of existing obligations, nor with the good understanding between the two countries upon which peace in the Far East depends." An important part of the report consisted of constructive proposals, among which was international coöperation in Chinese reconstruction. It also recommended the reform of the Chinese judicial system and the eventual abolition of the right of extra-territoriality still enjoyed by the United States and other Western nations.

During the controversy between the Western nations and Japan over her policy in China, the leading European powers, and also the League of Nations dominated by them, seemed inclined, as we have seen, to take no positive or decisive action which might offend Japan but rather to allow the United States to take the lead to the extent at least of expressing distrust of Japan's pacific intentions in China and Manchuria. This backwardness of European powers was carried to such an extent that the situation developed into a diplomatic contest between Japan and the United States, with the latter taking the side of China in her opposition to Japanese aggression. Nevertheless, the United States was not meddling with things that did not concern her in taking an active part in regard to the Far Eastern situation. In the first place, any disturbance of the peace in that region contains possibilities of unsettling conditions throughout the world. Furthermore, as a party to the Nine Power Treaty and as one of the originators of the Kellogg-Briand Pact, the United States naturally has some responsibility in maintaining the principles of those treaties.

In November, 1932 the report of the Lytton Commission was taken under consideration by the League of Nations Council, which subsequently referred the matter to the

Assembly. With the exception of the representatives of some of the smaller nations, the attitude of the League seemed to be that the proper course was not censure of Japan but rather an attempt at conciliation. With this object in view, a committee of nineteen of the Assembly was created. This committee drafted a resolution which (1) reaffirmed the Assembly resolution of March, 1932 asserting the doctrine of non-recognition of territorial gains brought about by force; (2) accepted those parts of the Lytton report which suggested an autonomous régime for Manchuria; and (3) invited the United States and Russia (the only important non-members of the League) to participate in the process of conciliation. Japan however was opposed to the extension of this invitation, ostensibly on juridical grounds.

During 1933 the invasion by Japan of Manchuria and the setting up of the puppet state of Manchukuo continued to receive attention from the League of Nations through its Committee of Nineteen. In February, 1933 the League Assembly finally decided to condemn Japan. The United States indicated its approval of this decision, and continued to maintain its policy of non-recognition of Manchukuo. Japan had evaded the Kellogg-Pact by the simple expedient of not declaring war, but had finally been condemned through the machinery of the League, although no sanctions were attached to this condemnation.

Japan thereupon announced her intention of withdrawing from the League. She maintained that such withdrawal would not deprive her of rights in her mandated territories, in one of which—the island of Yap—special interests of the United States were recognized by Japan at the Washington Conference of 1921.

The American policy of non-recognition of territorial gains secured through aggression, even though backed up by the League of Nations, did not prevent Japan from attaining her military objectives in Manchuria. This

policy was adopted by the United States as an alternative to the imposition of sanctions, which would probably have involved us in war. Neither the United States nor the members of the League felt that they had a sufficient interest in Manchuria to justify them in going to war in order to stop Japan.

#### ROOSEVELT'S FAR EASTERN POLICY

Even before assuming office in 1933, President Roosevelt declared that "American foreign policy must uphold the sanctity of international treaties." In this statement, he doubtless had in mind the Nine Power Treaty and the Briand-Kellogg Pact. The Stimson policy of non-recognition of Manchukuo was adhered to by the Roosevelt Administration. There was, however, a shift of emphasis toward a less energetic and more unobtrusive assertion of American rights in the Far East. The Administration showed no eagerness to adopt the rôle of leadership in marshalling world opinion against Japan. There seemed to be no good reason why we should do so, in view of the fact that the commercial and political interests of other powers, especially Great Britain, in the Far East are much greater than ours. We were willing, however, to join Britain, or to act concurrently with her, in protests against Japanese encroachments upon the interests of Western powers.

For example, with respect to the commercial interests involved in the open door principle of the Nine Power Treaty, the United States protested against the law promulgated by the Manchukuo authorities in 1934, which proposed to give an oil monopoly to a Japanese-controlled company. This scheme was no doubt closely connected with Japanese plans for naval supremacy in that region, since Manchuria is one of the principal sources of fuel oil for Japanese ships. American and British protests against

the application of the oil monopoly law, based on the open door provision of the Nine Power Treaty of 1922, were without effect. Japan maintained that, since Manchukuo is an independent state, the Treaty of 1922 is not violated. The United States, however, continues to maintain that Manchukuo is a mere puppet of Japan. The oil monopoly plan may be regarded as the opening wedge to Japanese control over commercial opportunities and development in the Far East, to the exclusion of the United States and other occidental powers.

Japanese encroachments on the mainland of Asia were not only economic but also political. Through various statements and claims made directly or indirectly by the Japanese Government, it has endeavored to build up what has been referred to as a Japanese Monroe Doctrine, in accordance with which Japan undertook to exclude other powers from taking any action in China which Japan regarded as hostile to her own security. At the same time, she was extending her political control in North China. Japanese goods were smuggled into this region, thereby going far toward closing the door to the trade of the United States and other Western powers in China.

Against the policy embodied in Japanese encroachments in China, the American state department has made formal protest. Thus in April, 1934, such a protest declared that "In the opinion of the American people and the American Government, no nation can, without the consent of the other nations concerned, rightfully endeavor to make conclusive its will in situations where there are involved the rights, the obligations, and the legitimate interests of other sovereign states."<sup>1</sup>

Again, in December of the following year, Secretary of State Hull declared that

"This Government adheres to the provisions of the treaties to which it is a party and continues to bespeak respect for

<sup>1</sup> U. S. Department of State, *Press Releases*, May 5, 1934, p. 245.



the provisions of treaties solemnly entered into for the purpose of facilitating and regulating, to reciprocal and common advantage, the contacts between and among the countries signatory.”<sup>1</sup>

These statements were made for the sake of the record and in order to clarify the legal position assumed by the United States of standing on the treaties. They did not, however, indicate that the Roosevelt Administration was ready to adopt any positive or active measures to compel the observance of treaties in regard to matters wherein the interests of the United States were not directly and vitally involved.

At the beginning of 1937 the situation in the Pacific was largely affected by the fact that the treaties for the limitation of armaments and of fortifications of American possessions in that area had expired. Attempts made by the United States and Britain at the London Conference, early in 1936, to induce Japan to extend the naval limitation treaties were unsuccessful, due to Japan's demand for parity. The United States was willing to concede to Japan a navy of a size proportionate to her needs, but we maintained that Japan's demand for equal tonnage would in reality give her a position of superiority on account of the smaller area and coastline which she needed to protect. The expiration of these treaties left the United States legally free to build up its navy in the Pacific without limit and to increase its fortifications and naval bases in Guam and the Philippines.

In spite of the policy apparently embodied in the Philippine Independence Act of 1934, there seems to be no conclusive evidence that the United States intends fully to withdraw from all participation in Far Eastern affairs. In this connection it may be mentioned that the link between the United States and the Far East was strengthened through the establishment in 1936 of an American-owned

<sup>1</sup> *Ibid*, December 7, 1935, p. 488.

regular passenger and mail airline across the Pacific from San Francisco to Hongkong, using Hawaii, Guam, Midway and Wake Islands and Manila as "stepping stones."

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## CHAPTER VIII

### THE UNITED STATES AND THE LEAGUE OF NATIONS

THE outbreak of the World War in 1914 demonstrated that the machinery then existing for the peaceful settlement of international differences, such as good offices, mediation, commissions of inquiry, arbitration treaties, and the Permanent Court of Arbitration, were insufficient to prevent the world from being visited by such a catastrophe. It seemed obvious to thinking men that if such a disaster were to be avoided in the future, some new and more effective means for the prevention of war must be devised. None but the most confirmed militarists consider war a good in itself. Every war is a war to end war—either that particular war or war in general. Prior to the World War, each combatant fought in order to bring the war to what would be—for him—a successful conclusion. In the World War, however, an additional aim which animated the United States in entering that conflict was that thereby we might assist in ending war in general and thus prevent any recurrence of such a cataclysm as the World War.

This was certainly a large undertaking. How was it to be accomplished? Obviously it could not be accomplished by any one nation unless it overshadowed the other nations of the modern world as Rome overshadowed those of the ancient world. Since no such condition existed, the only alternative was that the principal civilized nations of the world should act together for the accomplishment of this common end. This was suggested by former President Roosevelt when, in his speech accepting the Nobel Peace Prize in 1910, he said:

"It would be a master stroke if those great powers honestly bent on peace would form a league of peace, not only to keep the peace among themselves but to prevent, by force if necessary, its being broken by others."<sup>1</sup>

Again, the same distinguished statesman, in a letter to a New York newspaper in October, 1914, said:

"The one permanent move for obtaining peace, which has yet been suggested, with any reasonable chance of attaining its object, is the agreement among the great powers, in which each should pledge itself not only to abide by the decision of a common tribunal but to back with force the decision of that tribunal. The great civilized nations of the world which do possess force, actual or immediately potential, should combine in solemn agreement in a great world league for the peace of righteousness."<sup>2</sup>

There was thus in Roosevelt's mind no incompatibility between the maintenance of peace and the use of force against a power which broke the peace. His idea was embodied in the platform of an organization formed in the United States in 1916, known as the League to Enforce Peace. It proposed that the United States should join a league of nations binding its members (1) to hold conferences to codify rules of international law, (2) to submit all justiciable disputes to an international judicial tribunal for settlement, (3) to submit all other disputes to an international council of conciliation, and (4) to use economic and military force against any of their members who, without such submission, goes to war or commits acts of hostility against another member. The principles thus laid down were endorsed by many prominent men in the public life of the United States, including ex-President Taft and Senator Henry Cabot Lodge. In an address before the League in 1916, Senator Lodge said:

<sup>1</sup> Quoted by T. H. Dickinson, *The United States and the League*, 9.

<sup>2</sup> *Ibid.*, 10.

"I do not believe that when Washington warned us against entangling alliances, he meant for one moment that we should not join with other civilized nations of the world if a method could be found to diminish war and encourage peace."<sup>1</sup>

It thus appears that President Wilson was not the originator of the idea of a league of nations to enforce peace, but in 1916 he took it up and during the remainder of his life supported it with such tenacity and such cogent reasoning that it has since been generally associated with his name. On January 22, 1917, he delivered to the Senate the first of a series of addresses on the bases of a just and lasting peace. He intimated his intention of asking the American people to give "formal and solemn adherence to a League of Peace," and declared that "in every discussion of the peace that must end this war, it is taken for granted that that peace must be followed by some definite concert of power which will make it virtually impossible that any such catastrophe should ever overwhelm us again. Every lover of mankind, every sane and thoughtful man must take that for granted."

A year later, on January 8, 1918, the United States having meanwhile become engaged in the War, President Wilson appeared before a joint session of Congress and delivered an address containing, in a series of fourteen points, a more definite statement of the essential conditions of the peace which must follow the War.<sup>2</sup> The fourteenth point was as follows:

"A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."

In Wilson's view, such an association, in order to be effective, must be general. It must be based on the "organ-

<sup>1</sup> Dickinson, *op. cit.*, 10.

<sup>2</sup> For text of the fourteen points, see Appendix II.

ized major forces of mankind." Elaborating this idea in a speech of September 27, 1918, he said:

"There can be no leagues or alliances or special covenants or understandings within the general and common family of the League of Nations . . . There can be no special selfish economic combinations within the League, and no employment of any form of economic boycott or exclusion, except as the power of economic penalty, by exclusion from the markets of the world, may be vested in the League of Nations itself as a means of discipline and control."

He concluded his speech with the assertion that the United States was prepared "to assume its full share of responsibility for the maintenance of the common covenants and understandings upon which peace must henceforth rest."

The fourteen points laid down by Wilson as the bases of peace were accepted, in principle, both by Germany and also by the allied powers. He realized, however, that the drafting of the treaty of peace embodying his principles would be a task of great magnitude, and, rather than entrust it to subordinates, he decided, shortly after the Armistice, to go abroad as the head of the American delegation to the peace conference which met at Paris in January, 1919.

His action in going abroad was unprecedented and violated what may almost be considered an unwritten rule whereby presidents remain on American territory. After his departure a resolution was introduced in the Senate declaring his office vacant. His departure from the country was alleged by some persons to be unconstitutional. For this view, however, there seems to be no adequate foundation. When our military forces are fighting on foreign soil, the President, as commander-in-chief, might, if he chose, command them in person on the field of action. Or he might negotiate an armistice at the scene of hostilities in order to end them. There is nothing in the Constitution

which makes it illegal for him to exercise on foreign soil his constitutional power to negotiate treaties. Although, therefore, his attendance at the Paris Peace Conference was not unconstitutional, it was a mistake from the standpoint of expediency and tactics. By leaving the country he failed to keep in as close touch with the trend of public opinion on this side as he might otherwise have been able to do. Moreover, by negotiating the treaty in person he practically committed himself to the support of whatever provisions it contained, whether they reflected his principles or not. Had he entrusted the negotiations to subordinates and had the results of their efforts turned out to be not satisfactory, he would have been in a stronger position to repudiate those results.

President Wilson was also criticized for having appointed as the other members of the American delegation to the peace conference men who were not generally regarded as the leading statesmen in the United States without reference to party affiliation. He did not follow the precedent set by President McKinley in 1898 when he appointed a strong delegation of senators to negotiate the peace treaty with Spain. On Wilson's delegation there was no member of the Senate. Moreover, there was no prominent member of the political party opposed to Wilson, which then controlled both houses of Congress. The election of November, 1918, had returned majorities opposed to Wilson. This should have been a warning that the country was not prepared fully to accept his leadership. Indeed, under the parliamentary form of government which Wilson himself had approved in his early writings on government, he would have been forced to resign. Under our system of government, however, the President rests under no obligation whatever to resign under these circumstances, and Wilson was quite within his legal rights in proceeding with his plans regardless of the hostile majorities in Congress. He doubtless hoped that the people of the country, with

further knowledge and more mature consideration would, after all, follow his leadership. But, if so, he was destined to be disappointed.

#### THE CONFERENCE AT PARIS

The conference which was to draw up the treaty of peace met at Paris in January, 1919. Its proceedings were very largely controlled by the heads of the delegations from the principal allied and associated powers—Wilson, Lloyd-George, Clemenceau, and Orlando—known as the “Big Four.” Wilson’s prestige was at its height at the beginning of the conference, but, now that the fighting was over and the necessity for unity among the allied and associated powers was not so great, national rivalries and special aspirations began to manifest themselves. Although Germany had ceased fighting in the expectation that the treaty of peace would be based on Wilson’s fourteen points and the allied powers had also accepted them in principle, Wilson found that he was not able to secure the adoption of a treaty based completely on them. Wilson went to the conference asking nothing for the United States except such measures as would be for the benefit of all by preventing the recurrence of another such war. It soon appeared, however, that the premiers of the allied powers were not animated by the same spirit. They were still imbued with the old idea of dividing up the spoils of victory, and even to some extent with the spirit of revenge against the enemy. In their electoral campaigns they had made public promises which were inconsistent with any spirit of reconciliation with the enemy. They demanded huge reparations of indefinite amounts because any reasonable figure would have fallen short of what they had led their peoples to expect. They were so determined on this point that President Wilson had to acquiesce in a plan whereby the amount was to be determined later by a Reparations Commission.



France demanded that a large tract of territory on the left bank of the Rhine should be taken from Germany and erected into a buffer state under French or allied control. She was finally induced to modify this demand so as to provide for allied occupation of the territory for a period of fifteen years, on the understanding that the United States and Great Britain would enter into treaties with her pledging themselves to come to her assistance in case of unprovoked attack. These treaties were to become effective only if ratified by both governments, but they failed because the necessary approval of the United States Senate was not secured.

Italy put in a claim to Fiume which was inconsistent with the principles of the fourteen points. When Wilson publicly opposed this claim, Premier Orlando withdrew from the Conference and secured a vote of confidence from his parliament. The Italian people, who had but recently welcomed Wilson with such loud acclaim, now turned against him.

One of the developments during the Conference which was particularly embarrassing to Wilson was the adherence of the allied powers to certain secret treaties with Japan. In order to secure the adhesion of Japan to the allied cause, those powers had made with her secret agreements promising her certain of the spoils of victory. These included the German islands north of the equator and the Chinese province of Shantung which Germany had held under a lease. Wilson thus found all the powers arrayed against him in support of Japan's claims. He was finally induced to recognize Japan's position in Shantung, on receiving her promise that the province would ultimately be restored to China.

The various concessions which President Wilson felt compelled to make at the Conference had the effect of subjecting him to severe criticism in some quarters on the ground that he had abandoned his principles as laid down

in the fourteen points. It was suggested that it would have been better for him to withdraw from the Conference rather than to acquiesce in demands which were inconsistent with the making of a just and durable peace. In his mind, however, there was one thing which was the redeeming feature of the treaty, so good that it would leaven the whole lump, and that was the fulfilment of the fourteenth point in the provision for a league of nations. He felt that the unsatisfactory provisions of the treaty would in time be remedied or their evil effects overcome through the existence and operation of the league.

#### THE COVENANT OF THE LEAGUE

During the early part of the Paris Conference a resolution proposed by President Wilson was unanimously adopted which provided for the creation of a league of nations. The resolution also provided that the covenant of the league should be made an integral part of the general treaty of peace. For the purpose of drafting the terms of this covenant or constitution of the league, a commission was appointed, of which President Wilson was chairman, and in a few days it made a report of the preliminary draft. This draft was far from perfect, and when its contents were made public in the United States, various criticisms were made by leading men in public life, of which the principal were: (1) it contained no provision for safeguarding the Monroe Doctrine, (2) it lacked a provision prohibiting questions of a domestic character from coming within the jurisdiction of the League organs, and (3) no provision was made whereby a member might withdraw from the League. President Wilson took heed of all these suggestions and in the Covenant as finally adopted provisions were inserted intended to remedy all three of these defects. In order to meet another criticism a provision was inserted adopting, as a general principle, the rule of unanimity in the

decisions of the League organs. Certain other suggestions for changes, however, were not adopted.

On June 28, 1919, the Treaty of Versailles containing the Covenant of the League of Nations was finally signed by the German delegates. In bare outline, some of the more important provisions of the Covenant are as follows: An international organization was formed consisting of a Council and an Assembly, together with a permanent secretariat. The Council, as constituted in 1937, consisted of fifteen members, one from each of four great powers (Great Britain, France, Italy, and Russia), who have permanent representation, and one from each of eleven other smaller powers, some of whom are chosen every year by the Assembly to serve for three-year terms. The size of the Council may be changed from time to time. In the Assembly every nation that is a member of the League has from one to three representatives, but each nation has only one vote. Any fully self-governing state, dominion, or colony may, under certain conditions, become a member of the League. By the end of 1937 fifty-nine nations, or about five-sixths of the largest possible number, had become members. Any member may withdraw, upon giving two years' notice provided that all its international obligations and also its obligations under the Covenant have been fulfilled.

The purpose of the Covenant, as stated in the preamble, is "to promote international coöperation and to achieve international peace and safety." In order to accomplish these ends, various functions are assigned to the organs of the League. Thus, the Council is authorized to formulate plans for the reduction of national armaments and for preventing the evil effects of the private manufacture of arms. Article X, which Wilson considered to be the heart of the Covenant, authorizes the Council to advise upon the means for preserving, as against external aggression, the territorial integrity and existing political independence of

all members of the League. The following article declares that a threat of war is a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace. These two articles do not necessarily call for the use of force, but nevertheless seem to imply the possibility of it. They are intended to prevent the outbreak of war, as distinguished from the article on the reduction of armaments, which is intended primarily to remove one of the leading causes of war.

Other articles intended to prevent the outbreak of war are those by which the members pledge themselves to submit either to arbitration or to judicial settlement or to inquiry by the Council those disputes which cannot be satisfactorily settled by diplomacy. They further agree to abide by the decision rendered and not to make war against a member which complies therewith. They also undertake in no case to resort to war until three months after the decision has been rendered.

Suppose, however, that a member should resort to war in violation of its undertakings as contained in the above provisions. What sanction or method of enforcement is provided? This was one of the most important questions which the framers of the Covenant had to decide and may almost be considered the central, vital point of the whole scheme. On the one hand, should enforcement of these provisions be left merely to public opinion and moral suasion, or, on the other hand, should an international armed force be provided to stand ready to move against any member which disregards its pledges in the Covenant? The latter alternative was apparently favored by the French delegation at the Paris Conference, which advocated the insertion of a provision creating a permanent General Staff to direct the military operations of the League. In the end a compromise between these opposing alternatives was effected and is contained in Article XVI.

It provides that any member resorting to war in disregard of its covenants shall *ipso facto* be deemed to have committed an act of war against all other members of the League. Under these circumstances, therefore, no member of the League would be able to declare or maintain neutrality. The other members agree to sever all intercourse, financial, commercial, or personal, with the Covenant-breaking state, while it is made the duty of the Council "to recommend to the several governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League." Thus, while no standing League army or navy is created, this article clearly contemplates the possibility of the use of force against a Covenant-breaking state.

An important question which arose at the Paris Conference was as to what should be done with the former German and Turkish colonies and possessions. They were among the most valuable spoils of victory. According to previous practice, they would have been parceled out among the victors and assigned to them absolutely. Except for a concession in Mesopotamia and a cable station on the small Island of Yap in the Pacific Ocean, which by secret treaty with the allies had been assigned to Japan, the United States had no desire or claim for any control over the former German colonies or spheres of influence. President Wilson, however, was desirous of introducing a more enlightened method of dealing with the captured colonies and provinces. Since they were not able to stand by themselves under the strenuous conditions of the modern world, the Covenant provides for the mandate system whereby the tutelage of these backward peoples is intrusted to "advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as manda-

tories on behalf of the League." The League defines the degree of authority of the mandatory, who is required to render to the Council an annual report in reference to the territory committed to its charge. A permanent mandate commission is created to examine these reports and to advise the Council on all matters relating to the observance of the mandates.

In practice the mandate system may seem to differ but little from the old imperialistic system of absolute control. But it is an important step in advance to establish, at least theoretically, the principle of trusteeship. Since the struggle for colonies had hitherto been one of the causes of rivalry among the great powers, the establishment of the mandate system may tend to remove one of the causes of war.

No member of the League can be compelled to accept a mandate against its will. On the other hand, states that are not members of the League may be invited to accept a mandate. In 1920 the United States was invited to accept the mandate for Armenia, and President Wilson requested Congress to grant him power to accept the invitation, but the request was not granted.

A final provision of the Covenant which may be mentioned is that requiring all treaties entered into by any member of the League to be forthwith registered with the secretariat, and that they should not go into effect until registered. This was intended to prevent the future making of secret treaties such as those Japan made with the allies during the war. The members of the League further agree not to make any treaties inconsistent with the terms of the Covenant. The United States has recently cooperated to the extent of sending her treaties to the secretariat, for registration as well as for publication. Such registration of United States treaties, however, is of course not necessary in order to make them binding.

## THE SENATE AND THE LEAGUE

When the first draft of the Covenant of the League was made public, a round-robin was issued, signed by thirty-seven senators, declaring their unwillingness to approve the Covenant in that form and urging that peace with Germany should first be concluded and the Covenant considered afterwards. Among the signers were Senators Lodge and Knox, the former being chairman of the Senate Committee on Foreign Relations and the latter a former Secretary of State. Although, as we have seen, President Wilson was willing to make some changes in the first draft of the Covenant in order to meet the views of influential objectors, he was determined that the Covenant should be an integral part of the treaty of peace with Germany and so bound up with it that the two could not be acted upon separately by the Senate. There were three main reasons for including the Covenant as an integral part of the treaty: (1) The Covenant and the treaty of peace were parts of one general proposition which should stand or fall together. Some of the terms of the treaty were too severe, but the League was depended upon ultimately to overcome their evil effects. (2) In a technical sense the treaty and Covenant were joined together because the machinery of the League was to be used to carry out some of the terms of peace contained in the treaty. (3) From the standpoint of practical political tactics, it was thought that, by combining the two proposals in one document, it would make it easier to obtain the adoption of the Covenant by the Peace Conference and by the various nations.

On July 10, 1919, President Wilson presented the treaty containing the Covenant to the Senate and earnestly solicited its prompt approval. It was referred to the Committee on Foreign Relations where it was given lengthy consideration and was meanwhile also being debated in open session in the Senate. It is unnecessary now to go

into a detailed consideration of the bitter animosities which the treaty engendered. It was very largely a contest between the President and the Senate to secure control over the conduct of our foreign relations, and this was more a question of domestic than of foreign policy. This is evidenced by the series of fourteen reservations to the treaty which were adopted by the Senate in November, 1919. They seem mainly concerned with assuring control to Congress or the Senate of the various proceedings which would be caused by our membership in the League rather than with preventing our entrance into that body altogether. Of the fourteen reservations, the following five were among the more important:

1. In case of withdrawal from the League, the United States should be the sole judge as to whether its international obligations and its obligations under the Covenant had been fulfilled.

2. The United States "assumed no obligation to preserve the territorial integrity or political independence of any other country, or to interfere in controversies between nations under the provisions of Article X, or to employ the military or naval forces of the United States under any article of the treaty for any purpose unless in any particular case the Congress which, under the Constitution, has the sole power to declare war or authorize the employment of military or naval forces of the United States, shall by act or joint resolution so provide."

3. The United States was declared to have the sole right to interpret the Monroe Doctrine, which was wholly outside the jurisdiction of the League of Nations and entirely unaffected by any provision in the treaty.

4. If the United States should at any time adopt any plan for the limitation of armaments proposed by the Council of the League, it reserved the right to increase such armaments without the consent of the Council whenever the



United States should be threatened with invasion or engaged in war.

5. The United States should not be bound by any action of the Council or Assembly in which any member of the League and its self-governing dominions or colonies should cast in the aggregate more than one vote.

It was further provided that these reservations must be accepted by at least three of the four principal allied powers. They were adopted in the Senate by a majority vote. But when the resolution approving the treaty with these reservations came to a vote, it failed to receive the necessary two-thirds majority.

At the beginning of the struggle in the Senate only a small minority of irreconcilables were opposed to the approval of the treaty in any form. Another slightly larger minority favored approval without reservation or amendment. Most of the senators, however, favored approval with reservations safeguarding American rights and interests, but differed among themselves as to the particular reservations that should be adopted. President Wilson did not at first favor reservations of any sort, but when it appeared that otherwise the treaty would be lost, he indicated his willingness to accept merely interpretative reservations. This concession, however, was not sufficient to satisfy the senators who either opposed the treaty altogether or demanded strong reservations. A greater spirit of compromise on both sides might have brought about our entrance into the League with satisfactory reservations. The Presidential and Congressional elections of 1920 were approaching and the contest between the parties for control over the Government became so strong that calm and non-partisan consideration of the question of American entrance into the League became well-nigh impossible. It should be remembered, however, that in the final vote a majority of the senators favored American entrance into the League. Had it not been for the constitutional re-

quirement of a two-thirds vote, the United States would have become a member of the League in 1920.

President Wilson desired that the election of 1920 should take the form of a solemn national referendum upon the question of our relation to the League. Our electoral system, however, is not adapted to arriving at clear-cut popular decisions on any particular national issue. The result of the 1920 election was affected not merely by the attitude of the people toward the League but also by high taxes, the high cost of living, the general record of the Wilson administration, and by a widespread reaction from the high-strung activities of wartime.

#### NON-COÖPERATION WITH THE LEAGUE

During the Presidential campaign Harding gave mild approval to the idea of an association of nations. In his mind this was apparently to be a very loose sort of organization which would function through the mere holding of a series of conferences. After he became President, he did nothing to push this idea except to call the Washington Conference in 1921. In his first message to Congress in April, 1921, he declared that "in the existing League of Nations with its super-powers, this republic will have no part." During the two years of President Harding's administration, the policy of the State Department towards the League of Nations was mainly one of non-coöperation. Indeed, during the first six months, the League was completely ignored, even to the extent of failing to answer the communications of the League addressed to our Government. When it seemed that this attitude could not longer be maintained, the several communications were answered, together with the statement that "the Secretary of State has taken note of this information for any purpose of relevancy to the United States as a state not a member of the League of Nations." This failure to reply except after

unnecessarily long delay is not itself important except as indicating the general attitude of our Government towards the League at that time. President Coolidge, in his first message to Congress in 1923 stated that:

“Our country has definitely refused to adopt and ratify the covenant of the League of Nations. We have not felt warranted in assuming the responsibility which its members have assumed. I am not proposing any change in this policy, nor is the Senate. The incident, so far as we are concerned, is closed. The League exists as a foreign agency. We hope it will be helpful, but the United States sees no reason to limit its own freedom and independence of action by joining it.”

Entirely aside from the question of joining the League, we have not coöperated with the League to the extent that we might have, but, as a rule, only when it seemed necessary to safeguard our special interests.<sup>1</sup> Our reluctance to having official relations with the League sometimes has awkward consequences. For example, the international public health office was established at Paris in pursuance of a convention of 1907 to which the United States was a party. Since it seemed useless to maintain two international public health agencies, it was recommended in 1921 that the work of the Paris health office be turned over to the health organization of the League, but our Government refused to give its consent to the transfer. At the World Health Congress which met at Paris in 1926 it was again proposed that this transfer be made in the interests of simplicity and efficiency, but on account of our opposition the proposal was defeated.

Not only have we failed or refused to send representatives to many conferences or committees meeting under the

<sup>1</sup>An official of the State Department said publicly in 1925 that “in all matters of general humanitarian interest, as well as in matters directly affecting the United States, the Government plans to coöperate with the League of Nations, when such coöperation appears to be the best method of getting results.” Quoted by Garner, *American Foreign Policies*, 210 n.

auspices of the League, but even when represented in these bodies, our representatives have frequently not been full-fledged members but have participated in the meetings in an "unofficial and consultative capacity" or as "unofficial observers." The Administration was subjected to much criticism and even ridicule for its practice of unofficial coöperation. It was alleged with considerable truth that this was merely one of many indications that our Government was desirous of exercising rights in international affairs without assuming duties.<sup>1</sup> It must be remembered, however, that the Administration was not quite a free agent in this matter. In the treaties of 1921 restoring friendly relations with Germany and Austria, the Senate inserted a reservation to the effect that the United States shall not be represented on any body, agency, or commission created by the Treaty of Versailles unless authorized by Congress.<sup>2</sup> There was also on the statute books a provision enacted by Congress in 1913 forbidding the President from extending or accepting "any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so."<sup>3</sup> In the case of our participation in the agencies of the League, so strong has been the feeling in Congress against the League, that it would have been futile for the President to ask for legislative permission. Consequently, he evaded the letter of the law by appointing "unofficial observers." Probably the law restricting the President's discretion in this respect is unconstitutional, so that legally the President may be free to disregard it. However, from the standpoint of practical politics, the President did not feel himself to be free. Ever since the Senate wrecked President Wilson's foreign policy with reference to the

<sup>1</sup> Cf. the provision of the treaty of 1921 with Germany stipulating that the United States should have all the rights and advantages accruing to us under the Treaty of Versailles in spite of the fact that such treaty was not ratified by the United States. *Treaties, Conventions, etc., of U. S.*, III, 2598.

<sup>2</sup> *Treaties, Conventions, etc., of U. S.*, III, 2496, 2599.

<sup>3</sup> See below, Chap. XIX.

Treaty of Versailles and the League of Nations, the Executive has been largely under the domination of Congress, and especially under that of the Senate, to such an extent that it has hardly dared to antagonize that body by asserting an independent policy.

Despite the attitude of the Government, there is nothing to prevent private American citizens from serving in responsible positions on the League agencies, such as the secretariat and various committees and commissions. They may accept appointment from the League without Senatorial approval, and many of them have done so. American members played a very important part on the Dawes committee which dealt with the question of German reparations, and an American was appointed to the position of agent-general of reparations. When, in 1924, the League undertook to reconstruct the finances of Hungary, an American was made High Commissioner of the League for this purpose. American citizens and philanthropic organizations in the United States have contributed large sums to support the work of the League. One indication of the interest of the American people in the organs and activities of the League is evidenced by the swelling tide of American tourists who visit the seat of the League at Geneva.

#### THE LEAGUE AND THE CONSTITUTION

As has been demonstrated by numerous incidents in our courts and legislative bodies, those who are opposed to a law or proposed policy can usually find one or more provisions in the Constitution which they allege render it invalid. Likewise, those who are opposed to our joining the League of Nations adopt, as their first method of attack, the allegation that it would be unconstitutional. As late as 1925 a well-known writer on American foreign relations expressed the view that the League "was rejected by America solely because of its incompatibility with the Con-

stitution.”<sup>1</sup> The belief that the Constitution stands in the way of our joining the League, if honestly held, is based upon a misconception of the nature either of the Constitution or of the League. It is difficult to believe that the framers of the Constitution ever intended by that instrument to prevent us from taking such action as, in the discretion of the appropriate organs of our Government, should be necessary in order that we may join with other nations in promoting the common ends of peace and international coöperation. In fact, there would seem to be no constitutional objection to any undertaking involved in American membership in the League.<sup>2</sup> Any valid objection must be based on grounds of policy and expediency rather than on the Constitution.

Nevertheless, in order to allay the fears of any persons who may still think the Constitution stands in the way of our participation, it would do no harm to adopt a reservation, such as that suggested by Professor M. O. Hudson, which reads “that all action by the United States as a member of the League shall be subject to the limitations established by the Constitution with reference to the federal system of government and with reference to the exercise of the power to make treaties, the power to declare war, the power to make appropriations, and the power to appoint diplomatic representatives.”<sup>3</sup> The members of the League could not very well object to such a reservation, since they could not expect our Government to join or to agree to anything in violation of the fundamental law under which it operates. If it should turn out that any provision of the Constitution is violated by our joining the League, then there would be any one of three courses open to us: (1) to admit that full American membership is impossible, (2) to amend the Constitution so as to overcome the conflict, or (3) to retain such special status in

<sup>1</sup> W. F. Johnson, in *North American Review*, CCXXII, 381.

<sup>2</sup> For full discussion of this question, see Appendix IV.

<sup>3</sup> E. E. Lape (ed.), *Ways to Peace*, 290.

the League as the limitations of the Constitution may require.

#### THE LEAGUE AND THE MONROE DOCTRINE

As pointed out in the chapter on the Monroe Doctrine, Article X of the Covenant was intended to carry out President Wilson's proposal that "the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world." Professor Irving Fisher says, "Article X is the Monroe Doctrine extended to the whole world."<sup>1</sup> Article X and the Monroe Doctrine undoubtedly have important points of resemblance. In this connection it may be pointed out that the virtual announcement by the United States in the Monroe Doctrine that it would regard European intervention or aggression in the Western Hemisphere as a *casus belli* has not made it actually necessary for the United States to fight to maintain the Doctrine. The fact that it was known that the United States would do so if necessary has been one of the main factors in preventing European nations from taking such aggressive action as would inevitably have brought on a conflict with the United States. This is true in spite of the further fact that the balance of power in Europe and the lack of a concerted policy among European nations have contributed to the same end. If the readiness of the United States to fight to prevent a non-American aggressive nation from intervening in the Western Hemisphere has prevented such aggression and made it unnecessary for us to fight, it may well be believed that a Monroe Doctrine for the world, as embodied in Article X, would have the same effect in its wider application and that the United States, if a member of the League, would not actually have to use force in order to maintain it. In this case a willingness to use force, combined with preparedness to do so if necessary, would tend paradoxically toward the maintenance of peace.

<sup>1</sup> *America's Interest in World Peace*, 106.

Although the United States has not had to fight to ward off European aggression in violation of the Monroe Doctrine, the maintenance of this Doctrine has not been secured without the use of force. Such force has been used to maintain order and to police the situation in certain of the more disorderly Latin American countries, especially those in the Caribbean region. By analogy, it may be argued that, if the United States were a member of the League of Nations, we might be called upon, under Article X or XVI of the Covenant, to assist in using force to police the situation in the Balkans or other European centers of trouble. This, in the minds of many persons in the United States, has been one of the principal objections to American membership in the League. In spite of many fears expressed in 1920 that the Covenant of the League sets up a super-state, it must be increasingly clear to any one who impartially examines the question in the light of the developments of the last few years that such is not the case and that all the League can do is to advise its members as to what they should do in order to promote the common purposes for which it exists. If the United States, as a member of the League, should send an armed force to Europe in response to a call for help from the League, it would be a voluntary act on our part and carried through only after the necessary authority had been issued by the appropriate organs of our Government. The League, like the old Confederation of 1781-7, can request its members to furnish forces and funds, but it cannot order out troops nor levy taxes.

It was formerly supposed that the United States might regard intervention by the League of Nations in a dispute between Latin-American nations as a violation of the Monroe Doctrine. As we have seen, however, this supposition is groundless. This was illustrated by the attitude of the United States when the League intervened in the Leticia and Chaco disputes.



## THE QUESTION OF AMERICAN MEMBERSHIP

It seems at first sight a curious fact that the United States, although a leader in the movement for the establishment of the League of Nations, has not itself become a member. The best chance of joining was in 1919 when the question was first put to the nation. The responsibility for not joining at that time rests mainly on the shoulders of two men—Lodge and Wilson—the former through fighting the proposal by every device of practical politics; the latter through his unwillingness to compromise on safeguarding reservations. Since that chance to join was passed by, public opinion in the United States has apparently not favored the entrance of the United States into the League, and to this opinion the Government is naturally sensitive. A government cannot force its people, even if it would, into taking a step which they have shown themselves not yet prepared to sanction. This attitude of the people may be due mainly to ignorance, prejudice, or perversity, but nevertheless the government must respect that attitude so long as it remains unchanged. If it is wrong, it may be corrected by a process of education and ultimately the good sense of the people can be depended upon to prevail.

To hold that there are no reasons of any weight why we should or should not join the League is hardly a tenable position. As in the case of most important questions calling for national decisions, there is something to be said on both sides. It is the part of wisdom for the nation to decide in favor of that course which seems clearly to be supported by the weight of reason and argument.

Certain journals seem to think the United States is better off out of the League. Thus, the *New Republic* says that the United States, by not joining the League

“emancipated itself from its previous bondage to the policy of the Allies, which was concerned mainly with Euro-

pean interests or the colonial interests of European nations. It is for the benefit of Europe as well as of America and Asia that European governments are now obliged to reckon with the point of view, and even with the embarrassing selfishness and inertia of a major non-European nation. For it gives to the equally selfish, but more contentious, European peoples a motive to combine in order to assert their common welfare, and it forces them to recognize that hereafter the people of other continents do not propose to exist chiefly in order to be exploited, governed or patted on the back by Europe.”<sup>1</sup>

The League Assembly has come to be used as a forum from which to air grievances, to direct attention to conditions of international life that need to be remedied, and to bring appeals before the bar of international public opinion. There is nothing to prevent representatives of other nations from making speeches on that rostrum which reflect unfavorably upon the attitude or policies of the United States. This, in fact, has been done. Such incidents may put us in a bad light before a body in which we have no representative to make reply on our behalf. Although we may doubtless depend on the good sense of that body not to attach undue weight to apparently baseless charges against us, it would be of some advantage to us to have on that body a representative who could answer directly for us and present officially the views of our Government on all questions affecting us that may arise.

A more important consideration is that we may be practically bound, willy-nilly, by decisions made at meetings of the League organs at which we were not represented. If we may be bound by the decision, would it not be better for us to participate in the meetings at which the decision is arrived at? Since, as a rule, important decisions require a unanimous vote, we could block those which we deem to be against our interest if we were represented, but, as it is, we are practically helpless. That this is not an imaginary

<sup>1</sup> *New Republic* (June 22, 1927), p. 111.

danger is shown by the fact that, although we were not present at the Congress of Paris in 1856 at which a rule was adopted abolishing the use of privateers in naval warfare and at the time we refused formal assent to the rule, nevertheless we have ever since observed it and have felt practically bound by it. Again, since we did not "sit in" with the Allies when the Island of Yap was being disposed of, our interests in that island were not regarded and were only in some degree recognized after long and arduous negotiations. The elementary dictates of prudence suggest that we should be officially represented at international gatherings where decisions of vital importance to us are being made.

The League is a general concert of power intended to be the embodiment of what Wilson called the "organized major forces of mankind." If it does not quite reach this ideal, it is largely due to the absence from its council tables of such an important nation as the United States. It was recognized by Wilson and other advocates of the League that in order to reach a full measure of success, it must be universal, or practically so. Unless this condition were fulfilled, the members and the non-members might conceivably become divided into two opposite camps and reproduce on a world-wide scale the old régime of the balance of power in Europe.

On account of difference in position, the reasons and motives which justify some nations in joining the League may not operate with equal force in the case of others. Thus, the United States is racially more heterogeneous than some other nations, and this condition would probably decrease our influence in attempting to help settle an international dispute where racial hatreds are stirred up. Again, it must be remembered that the large majority of the members of the League are small nations. In the case of such small nations, whether located in Europe, in Asia, or in the Americas, membership in the League not only

involves little sacrifice on their part, but tends to increase their safety from attack and the general effectiveness of their international life. There seems to be good reason to believe that many of the Latin American nations have joined the League largely through the belief that it will serve as a make-weight against "Yankee domination." The attitude of the small nations throws little light on what the United States should do.

International coöperation such as finds its expression in joining the League of Nations necessarily involves some sacrifice of complete national freedom of action, practically if not legally; otherwise the League is a mere rope of sand. The motto of the League should be like that of D'Artagnan and his three musketeers: "One for all and all for one." Coöperation for the general good nearly always involves some renunciation of individual freedom. An individual living alone on a desert island can legally do absolutely as he pleases. He may be said to be in a state of nature. But when he comes to live in a society with other individuals, this is impossible. The complete freedom of each must be limited in order to promote the good of all. So nations may be said to have formerly lived largely in a state of nature. But complete national freedom of action was found not to be conducive to safe and sound international life. Consequently, the rules of international law developed which limit complete national freedom, but without at first an international organization to administer them. Such an organization, however, has now been formed in the League and in the Permanent Court of International Justice, whose establishment is one of the principal achievements of the League. The limitations upon the freedom of national action which is involved in international coöperation constitute the application to international life of the principle of the police power, well established in domestic law. This principle was first applied in international life to backward and disorderly

nations. It was imposed upon them by outside authority. Ultimately it must be applied to all nations, either by self-imposition or by the force of circumstances.

On account of the greater differences in race, language, political and social institutions, and historical traditions, the task of forming a federation of the nations is a much more difficult one than was the task of forming the American Union. It is likely to be a tedious process, because rationalistic approach to the question of nationalism *versus* internationalism cannot be made by the mass of the people. Old beliefs, traditions, loyalties, and institutionalisms die hard. But the point is that many of the same causes which led to the formation of the union of the American states, in spite of the strong state's rights feeling everywhere rampant, are leading to the closer coöperation of the nations of the world today. We may regret this tendency and sigh for the "good old days." But it would be foolish to blind ourselves to the inevitable trend toward the diminution of national sovereignties and the closer coöperation of nations. The maintenance of the American states as separate sovereignties was justifiable only on the ground that thereby the welfare of all and each was best promoted. When the majority of the people became convinced that this was not the case, but that peace, safety, and general welfare would be better served by union, then the cause of union was secure and state sovereignty was practically dead.

So in the world today, the maintenance of complete national freedom of action or the promotion of international coöperation are not preëminently desirable ends in themselves. They should be judged in the light of their relative usefulness in promoting the fundamentally desirable objects of peace, safety, and general welfare. When the people of the United States become convinced that these objects can be better promoted by much closer international coöperation than by adherence to a narrow nation-

alism, then the obstacles to American entrance into the League of Nations will be very largely removed.

It is not to be inferred that American entrance into the League would make it necessary for us to sacrifice our sovereignty and independence, except to the extent of recognizing the necessary limitations upon those concepts which are already imposed upon nations by the very conditions of international life. Nations are at the same time both independent and interdependent, but neither in an absolute sense, since each qualifies the other. Consequently, nationalism and internationalism are not entirely incompatible, but may in reasonable degree exist simultaneously and side by side.

In spite of the above considerations, the current prevalent view in the United States regarding entrance into the League of Nations was probably expressed by a recent writer on American diplomatic history who declared that the League of Nations

“has been a disappointing failure as a promise to keep the peace of the world or to make wars less likely. It has been a failure, not because the United States did not join it; but because the great powers have been unwilling to apply sanctions except where it suited their individual national interests to do so, and because Democracy, on which the original concepts of the League rested for support, has collapsed over half the world. If the United States had been a party, these same selfish national interests would have been at play, and American diplomacy would have been obliged to contend with them. Amidst a world studded with dictators, the European powers, unwilling to join in sacrifices to enforce peace, would have urged the United States to do the sanctioning in regions where, in turn, it had no vital national interests. . . . The rejection of the League in 1919 was an advantage to the United States by giving it a period to watch, wait, and see how the experiment would work. The lesson of the period 1919-1936 is that until the peoples of the world shall prove generally their willingness to make sacrifices for the com-

monwealth of mankind, the advice of the Fathers, against foreign entanglements in regions where the United States has no vital interest, holds as strong and good today as it did in the days of George Washington."<sup>1</sup>

It seems clear that, on account of the political situation in the United States, we are not likely to become a member of the League in the near future. As President Roosevelt declared in 1936, "we shun political commitments which might entangle us in foreign wars; we avoid connection with the political activities of the League of Nations."<sup>2</sup>

In order to meet objections to American entrance into the League, whether well founded or not, various reservations may be proposed. Two reservations which have been suggested are (1) that all action by the United States as a member of the League shall be subject to the applicable limitations of our Constitution, and (2) that any military, naval, or aërial obligations assumed by the United States as a member of the League shall be limited to the three Americas. In other words, any coercive action by the United States as a member of the League will be confined to the Western Hemisphere.

In addition, certain of the reservations attached by the Senate in 1919 to its resolution approving the Treaty of Versailles would seem under present conditions to be not improper, or at least practically necessary: (3) In case of withdrawal from the League, the United States should be the sole judge as to whether its obligations have been fulfilled. To this it may be necessary to add that withdrawal may take place at any time. It might further be reserved that (4) the United States assumes no obligation under the peace treaties, aside from the Covenant of the League, unless in any particular case Congress so directs.<sup>3</sup>

<sup>1</sup> Samuel Flagg Bemis, *A Diplomatic History of the United States* (New York, 1936), pp. 651-52.

<sup>2</sup> "The Address of the President of the United States at Chautauqua, New York, on August 14, 1936 on the Subjects of the Foreign Relations of the United States and of War," pp. 8-9.

<sup>3</sup> Cf. E. E. Lape (ed.), *Ways to Peace*, 290, 458.

These, and perhaps other reservations which might be suggested, seem necessary under present conditions. Any such important move as the entrance of the United States into the League can be carried out only in harmony with practical considerations which take into account the special position and interests of this country.

#### COÖPERATION WITH THE LEAGUE

Whether the United States joins the League or not, it should be borne in mind that our Government has coöperated, and is continuing to coöperate, with the League in many important ways. As President Roosevelt pointed out in the address quoted above, "we have coöperated wholeheartedly in the social and humanitarian work at Geneva. Thus we are a part of the world effort to control traffic in narcotics, to improve international health, to help child welfare, to eliminate double taxation and to better working conditions and laboring hours throughout the world."<sup>1</sup>

Although the League is still comparatively weak, as is only natural in the case of so young a body, nevertheless it is one of the central facts in the international life of the present time, and, as far as any one can see, is likely to continue to be such for many years in the future. To such an outstanding factor in international affairs, the United States, as an important member of the family of nations, cannot, in spite of its comparative isolation, remain completely indifferent. Not long before his death, President Harding said: "I do not believe any man can confront the responsibility of a President of the United States and yet adhere to the idea that it is possible for our country to maintain an attitude of isolation and aloofness in the world." In fact, no matter how much the League was anathema in the minds of representatives and senators,

<sup>1</sup> Cf. E. E. Lape (ed.), *Ways to Peace*, p. 9.



the Harding Administration to some extent and the Coolidge Administration to a greater extent found it impossible to ignore the existence of the League. Gradually, the policy of strict aloofness from the League was modified. Our Government began to coöperate in at least a hesitating way with the League and its agencies.

American coöperation with the League has taken various forms. Thus, we have sent representatives to conferences called by the League, among which may be mentioned the conference on communications and transit at Geneva in 1923, the international conference on opium held at Geneva in 1924 under the auspices of the League, the preparatory disarmament conference held at Geneva in 1926, and the international economic conferences of 1927 and 1933. More and more we are collaborating with the League in the solution of particular questions considered in special conferences called by the League. In addition, we have sent experts to represent us on certain technical committees or commissions attached to the League, such as those dealing with anthrax, serums, narcotics, traffic in women and children, counterfeiting of currency, maritime tonnage measurements, and control of traffic in arms. Since practically all of the technical, scientific, and humanitarian activities of an international character have come to be placed under the auspices of the League, we are under the practical necessity of coöperating with the League to the extent of participating in the meetings of its agencies which deal with matters in which we are interested.

The functions of the League, from the standpoint of purpose, may be divided into four classes: (1) to prevent the outbreak of war, (2) to remove the causes of war, (3) to serve as a clearing house of information on international affairs and as a means of international coöperation in respect to technical, scientific, and humanitarian matters, and (4) to serve as a forum for the discussion of international issues and as a means of bringing them before

the bar of international public opinion. The United States has coöperated with the League in the performance of all of these functions. The second of these purposes is the most difficult to achieve and is the one in which the League has been least successful. One of the causes of war is the maintenance of huge armaments, and the United States has participated in this phase of League work through its representation on the League's preparatory disarmament commission. This and similar agencies of the League are to some extent forums for the discussion of international issues, but in that respect are subsidiary to the Council and Assembly of the League. In this subsidiary way the United States participates in the fourth of the above purposes for which the League exists. The third of the above purposes is the one in which the United States has participated to the greatest extent for, as already noted, the United States has been represented on numerous bureaus and commissions of the League created to deal with technical, scientific, and humanitarian matters of international interest. This tendency has gone so far that the United States may almost be considered as virtually an informal associate member of the League for certain special purposes. Devious methods may be adopted for political reasons by an Administration which fears the opposition that would be encountered in the country, and especially in the Senate, by any whole-hearted and straightforward policy of coöperation with the League, but which realizes that we must play our part in the general movements of international life. The very force of circumstances has been the main cause which has transformed the policy of the United States toward the League from one of non-recognition, through the period of unofficial recognition and the sending of "unofficial observers," to the present stage of official recognition and coöperation. During this last stage, we have coöperated not only with reference to scientific and technical matters, but also to

some extent with reference to political matters. Thus, our representative sat as a full voting member of the League Council committee on Liberia, and in an advisory capacity on the Council committees considering the Leticia, Chaco, and Manchurian disputes. In the consideration of the last-named dispute, the United States even had a representative at the Council table, albeit with limited powers. This representative was Prentiss Gilbert, our consul at Geneva, who was authorized to sit at the Council table as a representative of the United States, in order that he might be in a position to participate in the discussions of the Council when they should relate to the possible application of the Pact of Paris to the Manchurian situation. In his instructions to Mr. Gilbert, however, Secretary Stimson was careful to add that "if you are present at the discussion of any other aspect of the Chinese-Japanese dispute, it must be only as an observer and auditor."

The extent to which the United States coöperated with the League in this affair aroused the criticism of anti-Leaguers in the United States and caused our Government to adopt a more cautious policy. A later meeting of the Council for further consideration of the Manchurian affair was held, not at Geneva, but at Paris, where the United States was represented by Ambassador Dawes. He was instructed not to participate in the sessions of the Council, but merely to "stand by" for the purpose of conferring with the representatives of the other powers. Nevertheless, the unprecedented extent to which the United States coöperated with the League in the Manchurian affair establishes an important precedent for consultation and common counsel in the event of threat of war. The Kellogg pact has served as a means of bringing us in closer contact with the League. The United States had hitherto coöperated with the League in almost all of its major purposes except that of taking measures for the preservation of peace. Our action in the Manchurian affair went a long

way toward filling this gap in the gamut of American coöperation.

In addition to official representation on League organs and committees and participation in conferences called under League auspices, there are other possible methods whereby the United States may coöperate with the League. These are the making of treaties or unilateral statements of policy or the passage of laws or resolutions by Congress embodying policies which support, either directly or indirectly, expressly or impliedly, certain of the provisions of the League Covenant in their actual working. An example of such a treaty is the Pact of Paris for the renunciation of war. One of the principal purposes of the League is to do away with aggressive war as an instrument of national policy, so that the United States, by becoming a party to the Pact of Paris, to that extent coöperates in supporting one of the purposes of the League.

Again, a difficulty involved in enforcing the sanctions of the League Covenant arises from the fact that the United States, while a non-member, is one of the most important potential sources of arms purchased by other nations. It would greatly assist the League members in carrying out their obligations under the Covenant to take coercive measures against a Covenant-breaking state if the United States should make it known that it would not sell arms or munitions to an aggressive nation.

This situation was illustrated by the Italo-Ethiopian conflict of 1935-36. Even before the League of Nations acted, President Roosevelt issued a proclamation, based on the Neutrality Act of 1935, placing an embargo upon the export of arms and munitions to both belligerents. The League later designated Italy as the aggressor, but the President's proclamation made no discrimination as between the belligerents. In this respect, therefore, our policy failed to agree with that of the League. Moreover, the President's embargo proclamation did not apply to

such an article as oil, which is useful in war, and this omission alone would have made practically futile any attempt on the part of the members of the League to apply an oil sanction to Italy. Nevertheless, the United States did coöperate with the League in this affair to the extent of removing itself as an obstacle to the application by the League to Italy of sanctions in respect to arms and munitions.

#### THE INTERNATIONAL LABOR ORGANIZATION

This organization, known as the I.L.O., was provided for in the Treaty of Versailles. Americans, among whom was Samuel Gompers, President of the American Federation of Labor, were influential in bringing about its creation. Mindful of the fact that, in a federal form of government such as ours, conditions of labor may be constitutionally under the control of the divisional, rather than of the central government, they secured the adoption of provisions which it might be feasible for such a government to ratify. The I.L.O. is an autonomous organization of the League of Nations, and all members of the League are automatically members of the I.L.O. The latter holds annual conferences, to which each member is entitled to send four delegates, two of them representing the government, one the employers and one the employees. The decisions of these general conferences do not bind the members, but rather take the form either of recommendations for national legislation or of draft conventions to be submitted for ratification by the members at their option.

The Covenant of the League of Nations does not provide specifically for the I.L.O. It does, however, imply the maintenance of such an institution in that article in which the members are pledged to "endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all coun-

tries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations.”<sup>1</sup>

The first conference of the I.L.O. was held at Washington in 1919. It was presided over by William B. Wilson, Secretary of Labor of the United States. For the next fourteen years, however, the conferences were held in Europe, usually at Geneva, and the United States, in deference to the isolationists, was not represented. The I.L.O. was handicapped by the non-participation of the United States, because the members hesitated to adopt higher labor standards than those of such an industrially important nation as the United States, with which they must compete. The advent of the Roosevelt “New Deal” Administration in 1933, however, brought with it a new interest in improving the conditions of labor, and it was almost inevitable that means of coöperation with the I.L.O. should be sought. A step in this direction was taken by the sending of four official observers from the United States to the I.L.O. conference held at Geneva in 1933. By the following year the Roosevelt Administration was ready to take the significant step of joining the I.L.O. This might have been done by treaty, but, even though President Roosevelt dominated Congress, this method would have been risky because the move could be blocked by one-third of the Senate. Consequently, in June, 1934, a joint Congressional resolution, which requires a mere majority in each house of Congress, was passed by that body and approved by the President. It authorized the President to accept membership in the I.L.O., but subject to the condition that the United States assumes no obligation under the Covenant of the League of Nations. The Conference of the I.L.O., then in session at Geneva, promptly extended to the United States an invitation to join, which was shortly afterward accepted by the President. Notification of this acceptance was trans-

<sup>1</sup> Article XXIII.

mitted through Mr. Prentiss Gilbert, American consul at Geneva.

In joining the I.L.O. the United States assumes no political obligation. Its only obligations are, first, to pay into the League treasury its share of the expenses of maintaining the organization; second, to send four delegates to the annual conferences; and, third, to consider any proposed legislation or conventions recommended for adoption by the I.L.O. This significant action means that the weight of the United States will henceforth be thrown in support of the efforts centering at Geneva for the amelioration of the conditions of labor throughout the world.

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## CHAPTER IX

### THE UNITED STATES AND THE WORLD COURT

THE project of an international judicial tribunal open to the nations of the world for the settlement of their disputes was one which interested the Government of the United States as early as 1899. Our delegates to the First Hague Peace Conference, which met in that year, submitted a plan for the establishment of a permanent international tribunal. It was natural that the United States should take the lead in this matter because our Supreme Court at the time of its establishment was to some extent a sort of international tribunal. The nations of the world, however, were not yet ready to take such a large stride forward in setting up international judicial machinery. Instead, they adopted a much milder proposal. This was the provision for the establishment of the so-called Permanent Court of Arbitration. As in the case of the Holy Roman Empire, which Voltaire declared was neither holy, nor Roman, nor an empire, so the Permanent Court of Arbitration is neither permanent, nor a court, nor very well designed for arbitration. It is really nothing more than a panel or eligible list of four judges or arbitrators appointed by each of the signatory powers. The United States is one of these powers, although it signed with reservations designed to safeguard the Monroe Doctrine and the policy of avoiding foreign entanglements. Whenever an international dispute arises, each of the parties may choose two members of the panel and these four, together with a fifth member chosen by them, act as arbitrators. Although this plan did not go as far as our delegates desired, they accepted it as a step in the right direction.



At the Second Hague Peace Conference held in 1907, our delegates, who were appointed by President Roosevelt, renewed their efforts to secure the establishment of a real permanent international court. They were instructed by the Secretary of State, Mr. Elihu Root, to try to bring about "a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility." A plan for such a permanent tribunal was discussed, but no agreement could be reached as to the method of selecting the judges. It seemed to be impossible at that time to hit on a plan which would be satisfactory to both large and small nations. The small nations insisted on the principle of legal equality of states, from which they inferred that they were entitled to an equal voice in the selection of judges; while, on the other hand, the large nations were not willing to agree to submit their disputes to a tribunal on which they might not have a representative. Since there seemed at that time to be no way of reconciling these conflicting interests, the project of establishing a permanent international tribunal was allowed to languish until after the World War.

Conditions at the Peace Conference at Paris in 1919 were not conducive to the careful consideration desirable in formulating a plan for an international court, but, in Article XIV of the Covenant of the League of Nations, a provision was inserted that "The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice." It was further provided that this Court should be "competent to hear and determine any dispute of an international character which the parties thereto submit to it." By Article XIII it was declared that among

disputes generally suitable for submission to arbitration or judicial settlement are those concerning (1) the interpretation of a treaty, (2) any question of international law, (3) the existence of any fact which, if established, would constitute a breach of an international obligation, or (4) the nature or extent of the reparation to be made for the breach of an international obligation.

In compliance with Article XIV the League Council appointed an advisory committee of jurists, composed of ten of the foremost jurists of the world, drawn from as many different countries. Mr. Elihu Root, Secretary of State in the administration of President Roosevelt, was a prominent and influential member. This committee met in the summer of 1920 and formulated a plan for the court based on the plan offered by the American delegates to the Second Hague Conference of 1907. The difficulty regarding the selection of judges had meanwhile become simplified through the establishment of the League of Nations and was overcome through a device suggested by Mr. Root. The Committee's plan also provided that the Court should have compulsory jurisdiction to decide disputes falling in any of the four classes mentioned above. When, however, the plan was submitted to the Council for approval, this provision was objected to on the ground that it went beyond the scope of Article XIV of the League Covenant which apparently contemplates merely voluntary jurisdiction. Even apart from this, however, the great powers represented on the League Council were not ready to confer compulsory jurisdiction upon the Court. The Council accordingly changed this provision. When the plan was submitted to the League Assembly, some members objected to the change. A compromise was finally effected whereby an "optional clause" was attached to the protocol or statute of the Court providing for compulsory jurisdiction as between signatory powers expressly accepting the same. On December 16, 1920, the statute, as thus amended, was

ready for submission. It was to go into effect when twenty-two nations ratified it. This number was obtained by September, 1921, and the Court held its first session in January, 1922. More than fifty nations have now signed the protocol, and the large majority of these have also signed the optional clause for compulsory jurisdiction.

#### THE ORGANIZATION AND COMPETENCE OF THE COURT

The Court is composed of fifteen judges, of whom nine constitute a quorum. They are chosen regardless of their nationality from among jurists of recognized competence and of high moral character. In accordance with the suggestion of Mr. Root, it is provided that they shall be chosen by concurrent majority vote of the League Council and Assembly, acting separately, from a list of candidates nominated by the national groups in the Permanent Court of Arbitration. No group may nominate more than four candidates, not more than two of whom may be of their own nationality. Provision is made in the statute of the Court whereby a state which has accepted the statute but is not a member of the League of Nations may be allowed to participate in electing the judges. The judges are elected for nine-year terms and may be reelected.

The first election for judges was held in September, 1921. A group of eminent jurists was chosen from widely separated parts of the world, no two of them being from the same country. Among the judges chosen at that time was Professor John Bassett Moore, an American citizen and one of the leading authorities on international law in the United States. The fact that an American citizen was chosen in spite of the fact that the United States had not joined the Court shows that the judges are not chosen to represent the interests of the particular countries of which they are citizens. They are chosen rather on account of their ability, reputation, and learning and, if they repre-

sent anything, it is a system of law. In fact, it has happened that a judge has voted to decide a case against the contention of his own country. Although technically citizens of their respective countries, the judges may be said in a large sense to be citizens of the world.

As a member of the Permanent Court of Arbitration, the United States, through its national group of members on that Court, was entitled to participate in nominating candidates from whom the judges were to be chosen. It refrained from doing so, however, in view of the attitude of our State Department that since the members of our group were appointed under the Hague Convention of 1907, it would be inadvisable for them to act under another treaty to which the United States was not a party. When, however, in 1923, new nominations were in order on account of a vacancy which occurred in the membership of the Court, the State Department interposed no objection to the making of nominations by our national group, and such nominations were accordingly made, and have since been made.

A judge of the World Court cannot be dismissed except by unanimous vote of the other judges. The Court elects its own President. The seat of the Court is established at The Hague, where it remains permanently in session except during vacations. A regular session is held annually. The general expenses of the Court are borne by the League of Nations. The judges receive salaries which are not large but adequate.

The parties before the Court are not individuals but states. The Court is open to the nations of the world generally and especially to members of the League of Nations, also to states mentioned in the annex to the Covenant. Since the United States is thus mentioned, it may bring cases before the Court, regardless of the fact that it is not a member of the League. When a state which is not a member of the League is a party to a case before

the Court, the statute provides that the amount which that party is to contribute towards the expenses of the Court is fixed by the Court. The Court has jurisdiction over all cases which the parties refer to it and over all matters especially provided for by treaty. In handing down its decisions or judgments, the Court is directed to apply the provisions of existing treaties, international custom, and the generally accepted principles of international law. As subsidiary means for the determination of the rules of law, the Court may draw upon judicial decisions and the opinions expressed by the best qualified writers and publicists. In handing down a judgment, the Court is required to state the reasons on which it is based. If the judgment is not unanimous, dissenting opinions may be filed. No particular sanction is provided for carrying the Court's judgments into effect, so that in general they must depend on public opinion for their enforcement.

#### ADVISORY OPINIONS

It is provided by Article XIV of the League Covenant that, in addition to judgments, the Court "may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." An advisory opinion is an answer given by the Court to a legal question propounded to it by the proper authority. In several of the American states, including Massachusetts, the highest state court is required by the constitution to give advisory opinions when requested to do so by the governor or legislature. It is of assistance to the legislature in avoiding the passage of an unconstitutional law to be able to find out beforehand whether there are constitutional objections to a pending bill. Advisory opinions, however, do not possess the authority of decisions between adverse parties, because they are not generally so well argued or considered.

The statute of the World Court, as amended in 1936, and also the Court's rules lay down the method of procedure to be followed in giving advisory opinions. In giving advisory opinions, the Court has endeavored to assimilate its procedure as nearly as possible to that followed in handing down judgments. Except in minor details, there is little difference in the procedure in the two classes of cases. In considering requests for advisory opinions, the Court hears arguments on both sides. The statute provides that when such a request is received, notice shall be sent to all states that are members of the League of Nations, and that are entitled to appear before the Court. The statute of the Court as well as its rules require as full publicity in all of the proceedings connected with advisory opinions as in the case of judgments.

One question which has arisen is as to whether the Court is compelled to give such an opinion when requested to do so by the Council or Assembly. The language of Article XIV of the Covenant seems to imply that it is not compulsory, and the Court itself has adopted and acted upon that view. In the Eastern Carelian matter about which the Council of the League asked the Court for an advisory opinion in 1923, the Court declined to grant the request. The case arose out of a dispute between Finland and Russia. Since, however, Russia declined to recognize the jurisdiction of the Court, that tribunal refused the request for an advisory opinion, on the ground that it could not compel a state without its consent to accept the jurisdiction of the Court. This case is important from the standpoint of other non-members of the Court such as the United States, and tends to show that the Court may be depended upon not to issue an advisory opinion affecting them without their consent.

## RELATIONS BETWEEN THE COURT AND THE LEAGUE

It has been shown that the United States at an early date took the lead in the movement for the establishment of a permanent international Court and that American citizens have played a prominent and influential part in the actual establishment and operation of the existing World Court. In view of these facts, it seems surprising that the United States is not yet a full-fledged member of the Court. The explanation lies in the general reaction against international coöperation which prevailed in the United States following the World War, and particularly in the fact that the issue regarding the World Court became involved with that regarding the League of Nations. It was alleged by those who were extremely opposed to American entrance into the League, particularly by members of the Senate, that the Court was so closely connected with the League that we could not join the Court without becoming entangled in the League. They claimed that for us to join the Court would mean that we would enter the League "by the back door."

In order to test the validity of this objection, it is necessary to consider the relation between the Court and the League. Since the Council and the Assembly of the League are not legislative bodies, they could not, on their own authority enact and put into effect the statute of the World Court. It was therefore submitted to a referendum of the states eligible to join, and membership in the League was not a condition of eligibility. The constitution of the Court is not the Covenant of the League but the statute adjoined to the protocol or treaty agreed to by the member states. It is true that the general expense of maintaining the Court is paid through the League, but not by the League, since the League is reimbursed therefor by *pro rata* contributions of the states that are members of the Court. The United States, if a member of the Court and not of the

League, might pay its proportionate share of the expense directly to the registrar of the Court. This refers, of course to the general expense of maintenance and not to the costs of special cases, which are assessed upon the litigants.

The Court is sometimes spoken of as the judicial department of the League. This implies a somewhat closer relationship between the two bodies than the facts justify. The Court, as we have seen, may decline to give advisory opinions when requested by the organs of the League. The groups of states that are members of the Court and of the League may not be, and are not, identical. As Sir Eric Drummond, former secretary-general of the League, has pointed out, although the Court "derives its authority from the League, its judgments are in no way subject to advice or revision by the council or by the assembly."<sup>1</sup> It is true that there is a relationship between the Court and the League in the sense that both are international agencies which coöperate with each other in their respective spheres in the settlement of international disputes and in the promotion of international concord. Political issues which may disturb the peace are more properly submitted to the League for settlement. The Court cannot afford to become involved in political issues or disputes, for if it should do so, its prestige would be diminished. Its proper sphere is the settlement of justiciable questions according to well-established rules and understandings. But even justiciable disputes may have political implications, and in settling such disputes, as for example those relating to boundaries, the Court may indirectly assist in the maintenance of peace.

It is sometimes alleged that the Court is subject to the control of the League because its judges are elected by the organs of the League. After being elected, however, they are quite independent of any control by the League. They

<sup>1</sup> *Acts and Documents Concerning the Organization of the Court*, 320, quoted in J. B. Moore, *International Law and Some Current Illusions*, 132.



are not subject to impeachment or removal by the organs of the League. The relation between the League and the judges of the World Court is very similar to that between the President and the judges of the Supreme Court of the United States. The seat of the Court was located at The Hague rather than at Geneva in order to emphasize the tribunal's independence.

#### THE QUESTION OF AMERICAN ADHESION

The Administration, although realizing to some extent the need of greater international coöperation, was for several years after the War so much under the domination of the Senate in the conduct of foreign relations that its efforts in this direction were for the most part feeble and inconsequential. Nevertheless, it undertook the initiative in the official movement looking toward American adhesion to the World Court. On February 24, 1923, President Harding sent a special message to the Senate asking the consent of that body to American adhesion to the World Court protocol, except the optional clause for compulsory jurisdiction and subject to certain conditions or reservations suggested in an accompanying statement drawn up by Secretary Hughes. In this statement Mr. Hughes declared that none of the provisions of the Court Statute prevented a non-member of the League from adhering to the Court. He pointed out that the League Council and Assembly, in electing the judges of the court, "do not act under the Covenant of the League but under the Statute of the Court and in the capacity of electors performing duties defined by the Statute." It was necessary, however, that the United States should have an equal voice in future elections of the judges. He suggested that American adhesion should be effected under four conditions which, in substance, were as follows: (1) we do not assume any obligations under the League; (2) we may participate upon an

equality with other states in the election of judges; (3) Congress shall determine what part of the expense we shall bear; and (4) the Statute of the Court shall not be amended without our consent.<sup>1</sup>

From February, 1923, when the above recommendation was made by the President until the Senate finally took definite action upon it, nearly three years elapsed. On this occasion, as on others, the Senate abundantly earned its right to be called a deliberative body. During these three years, favorable action continued to be urged by the Executive head of the nation. In his annual address of December 6, 1923, President Coolidge adhered to the policy of his predecessor, saying: "As I wish to see a court established, and as the proposal (for the World Court) presents the only practical plan on which many nations have ever agreed, though it may not meet every desire, I therefore commend it to the favorable consideration of the Senate with the proposed reservations."<sup>2</sup>

The four conditions laid down by Secretary Hughes in his statement of February, 1923, had at first seemed sufficient to the Administration. However, in his annual message of December 3, 1924, President Coolidge, while reiterating his recommendation for favorable Senate action, suggested a fifth condition or reservation to the effect that "our country shall not be bound by advisory opinions which may be rendered by the Court upon questions which we have not voluntarily submitted for its judgment."<sup>3</sup> In asking for favorable action upon his recommendation, the President was apparently supported by preponderant public opinion. A number of newspapers which were opposed to our entrance into the League favored our joining the Court. The Senate continued its dilatory tactics, but finally, in the spring of 1925, reached an agreement to

<sup>1</sup> Cong. Record, February 24, 1923, vol. 64, p. 4499 f.

<sup>2</sup> *Ibid.*, December 6, 1923, vol. 65, p. 96.

<sup>3</sup> *Ibid.*, December 3, 1924, vol. 66, p. 55.

begin debate on the proposal the following December. At about the same time the House of Representatives passed by a large vote a resolution advocating American adhesion under the Hughes-Coolidge reservations and indicated its readiness to concur in legislation necessary to provide funds to pay our share of the expense of maintaining the Court. In his annual message to Congress of December 8, 1925, President Coolidge, after again calling the Senate's attention to the proposal and the five suggested conditions, argued in favor of American adhesion so cogently that his statement is worthy of quotation at length. He said:

"The Court appears to be independent of the League. It is true the judges are elected by the Assembly and Council, but they are nominated by the Court of Arbitration, which we assisted to create and of which we are a part. The Court was created by a statute, so called, which is really a treaty made among some forty-eight different countries, that might properly be called a constitution of the Court. This statute provides a method by which the judges are chosen, so that when the Court of Arbitration nominates them and the assembly and council of the League elect them, they are not acting as instruments of the Court of Arbitration or instruments of the League, but as instruments of the statute.

"This will be more apparent if our representatives sit with the members of the council and assembly in electing the judges. It is true they are paid through the League though not by the League but by the countries which are members of the League, and by our country if we accept the protocol. The judges are paid by the League only in the same sense that it could be said United States judges are paid by the Congress. The Court derives all its authority from the statute and is so completely independent of the League that it could go on functioning if the League were disbanded, at least until the terms of the judges expired.

"The most careful provisions are made in the statute as to the qualifications of judges. Those who make the nominations are recommended to consult with their highest court of justice, their law schools and academies. The judges

must be persons of high moral character, qualified to hold the highest judicial offices in their country, or be jurists of recognized competence in international law. It must be assumed that these requirements will continue to be carefully met, and with America joining the countries already concerned it is difficult to comprehend how human ingenuity could better provide for the establishment of a court which would maintain its independence. It has to be recognized that independence is to a considerable extent a matter of ability, character, and personality.

“It does not seem that the authority to give advisory opinions interferes with the independence of the Court. Advisory opinions in and of themselves are not harmful, but may be used in such a way as to be very beneficial because they undertake to prevent injury rather than merely afford a remedy after the injury has been done. As a principle that only implies that the Court shall function when proper application is made to it. Deciding the question involved upon issues submitted for an advisory opinion does not differ materially from deciding the question involved upon issues submitted by contending parties. Up to the present time the Court has given an advisory opinion when it judged it had jurisdiction, and refused to give one when it judged it did not have jurisdiction. Nothing in the work of the Court has yet been an indication that this is an impairment of its independence or that its practice differs materially from the giving of like opinions under the authority of the constitutions of several of our States.

“No provision of the statute seems to me to give this Court any authority to be a political rather than a judicial court. We have brought cases in this country before our courts which, when they have been judged to be political, have been thereby dismissed. It is not improbable that political questions will be submitted to this Court, but again up to the present time the Court has refused to pass on political questions and our support would undoubtedly have a tendency to strengthen it in that refusal.

“We are not proposing to subject ourselves to any compulsory jurisdiction. If we support the Court, we can never be obliged to submit any case which involves our interests for its decision. Our appearance before it would always be voluntary for the purpose of presenting a case which

we had agreed might be presented. There is no more danger that others might bring cases before the Court involving our interests which we did not wish to have brought, after we have adhered, and probably not so much, than there would be of bringing such cases if we do not adhere. I think that we would have the same legal or moral right to disregard such a finding in the one case that we would in the other.

"If we are going to support any court, it will not be one that we have set up alone or which reflects only our ideals. Other nations have their customs and their institutions, their thoughts and their methods of life. If a court is going to be international, its composition will have to yield to what is good in all these various elements. Neither will it be possible to support a court which is exactly perfect, or under which we assume absolutely no obligations. If we are seeking that opportunity, we might as well declare that we are opposed to supporting any court. If any agreement is made, it will be because it undertakes to set up a tribunal which can do some of the things that other nations wish to have done. We shall not find ourselves bearing a disproportionate share of the world's burdens by our adherence, and we may as well remember that there is absolutely no escape for our country from bearing its share of the world's burdens in any case. We shall do far better service to ourselves and to others if we admit this and discharge our duties voluntarily, than if we deny it and are forced to meet the same obligations unwillingly.

"It is difficult to imagine anything that would be more helpful to the world than stability, tranquillity, and international justice. We may say that we are contributing to these factors independently, but others less fortunately located do not and can not make a like contribution except through mutual coöperation. The old balance of power, mutual alliances, and great military forces were not brought about by any mutual dislike for independence, but resulted from the domination of circumstances. Ultimately they were forced on us. Like all others engaged in the War, whatever we said, as a matter of fact we joined an alliance, we became a military power, we impaired our independence. We have more at stake than anyone else in avoiding a repetition of that calamity. Wars do not spring

into existence. They arise from small incidents and trifling irritations which can be adjusted by an international court. We can contribute greatly to the advancement of our ideals by joining with other nations in maintaining such a tribunal.”<sup>1</sup>

Following this strong advocacy of the Court by the President and in the light of unmistakable evidences of widespread popular support of the proposal throughout the country, the Senate began debate on the question. The discussion runs through some three hundred pages of the Congressional Record, and would doubtless have run longer if the wishes of a small coterie of senators had prevailed. They gave evidence of their intention of delaying indefinitely by talk the vote on a question which had already been thoroughly discussed both in and out of Congress. They brought up every conceivable objection, such as the possibility of secret advisory opinions. They raised objections to the British dominions, such as Canada and Australia, having each a vote on judges in the League Assembly, although they did not object to many less important nations having a vote there. They declared that before an international court could function properly, international law must be codified. Some of them endeavored to sidetrack the matter by proposing the establishment of a new and different court. Since it was hardly to be supposed that the signatory powers would scrap the existing court for the nebulous promise of a better one made by these senators, the proposal was evidently not intended to be constructive. In spite of the “horrendous international goblins” conjured up by the small group of irreconcilables, the large majority of senators were determined to pass the resolution and for this purpose invoked the rule of closure. By this means the question was finally brought to a vote nearly three years after President Harding had asked for

favorable action, the resolution being passed on January 27, 1926, by a vote of 76 to 17.

As finally passed, the Senate resolution contains a series of five reservations and reads as follows:

*“Resolved (two-thirds of the Senators present concurring),* That the Senate advise and consent to the adherence on the part of the United States to the said protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said statute), and that the signature of the United States be affixed to the said protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the council and assembly of the League of Nations, in any and all proceedings of either the council or the assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said protocol and that the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the court shall not render any advisory opinion except publicly after due notice to all States adhering to the court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United

States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

In an attempt apparently to make it as difficult as possible for the United States to become a member of the Court, it was further provided in the resolution that these reservations must be accepted, through an exchange of notes, by the powers signatory to the Court protocol. In other words, every one of the states which have joined the Court must specifically accept the American reservations before the United States would become a member. Any one of these states, by refusing to accept them, may block American entrance. The stringency of this requirement will be perceived when it is remembered that the irreconcilables in the Senate at the time of the consideration of the Treaty of Versailles did not go so far, but demanded merely that three of the four principal allied and associated powers should accept the Lodge reservations to the treaty.

In addition to the above five reservations, the Senate resolution also contained two "understandings," couched in familiar language, the first of which was intended to safeguard the Senate's treaty-making power and the second the Monroe Doctrine. These understandings, which are not expressly required to be accepted by the present signatories, are as follows:

*"Resolved further, As a part of this act of ratification that the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and*

*Resolved further, That adherence to the said protocol and statute hereby approved shall not be so construed as to*



policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions."

Of the above five reservations which must be accepted by the present signatories, the first four are almost identical with the original Harding-Hughes reservations of 1923, except that to the fourth one has been added the provision that the United States may at any time withdraw its adherence to the protocol. These four reservations are in the main unobjectionable. The first part of the fifth reservation, requiring publicity in the rendering of advisory opinions is also unobjectionable, since it merely describes the present well-established practice of the Court and is provided for by the Court statute. The second part of the fifth reservation embodies the substance of the additional reservation suggested by President Coolidge in 1924, but also goes much further in prohibiting the Court from rendering without our consent an advisory opinion regarding any question "in which the United States has or claims an interest."

Almost at once seven small and unimportant states indicated their acceptance of the American reservations. Other signatories of the protocol, however, deemed it desirable to confer together in order to determine what their attitude should be. At the March, 1926, meeting of the League Council, Sir Austen Chamberlain, of Great Britain, pointed out that it "is not usual that rights established by an instrument which has been ratified should be varied by a mere exchange of notes." The Council called a conference of signatories to meet at Geneva in September of that year. The United States was also invited to send a representative to this meeting for the purpose of participating in the discussion regarding our reservations. Secretary of State

Kellogg, however, on behalf of our Government, declined the invitation on the ground that the reservations were plain and unequivocal. He also stated that he had no authority to change the procedure of an exchange of notes stipulated in the Senate resolution and that he saw no difficulty in this method of procedure. The interposition of the Council of the League in the matter was evidently distasteful to the Administration. It also created an unfavorable impression among those persons in the United States who advocated American adherence to the Court but who did not want our Government to have any dealings with the League.

About forty of the signatories accepted the Council's invitation to attend the meeting at Geneva. At this meeting there appeared to be a general disposition to accommodate the United States as far as practicable without interfering with the usefulness of the Court and without placing the United States in a position of superiority over the other members. The principal difficulty encountered by the conference in arriving at a conclusion in harmony with these objects was the ambiguity, not of the American reservations, but of the Court statute or League Covenant. The conference found no difficulty in agreeing to the first three reservations, to the first part of the fourth, and to the first part of the fifth. The latter parts of the fourth and fifth reservations gave rise to more discussion. The statute of the Court contains no provision for its own amendment, but it is adjoined to a protocol or treaty, and if the rules regarding the amendment of treaties apply, the consent of all the signatories would be necessary, and there would seem to be no special ground of objection to the privilege asked for by the United States in the latter part of the fourth reservation, since each of the other signatories would have the same privilege.

an advisory opinion regarding any matter in which the United States has or claims an interest, gave rise to the greatest difficulty and proved to be the main stumbling block in the way of American adherence. If this reservation were accepted, the United States would have practically a power of veto over any attempt on the part of other nations to secure advisory opinions. It was only natural that at the conference of signatories the other nations, members of the Court, should have evinced an unwillingness to allow the United States to have the power of vetoing advisory opinions, unless each member of the Court represented in the Council or Assembly also has that power. Whether each now has it or not is uncertain, due to the ambiguity of the League Covenant as to whether the Council or Assembly, when requesting an advisory opinion, must act unanimously or merely by majority vote. The Covenant seems capable of being interpreted in either sense. The conference of signatories was caught between two conflicting considerations. On the one hand, while the conference desired to facilitate the entrance of the United States into the Court, this could be effected only if the Covenant were construed as requiring unanimity in requesting advisory opinions. On the other hand, it seemed undesirable to fix a hard and fast precedent requiring unanimity, as this might greatly impede the advisory function of the Court. Especially now that the size of the Council has been considerably increased, it will be more difficult to secure unanimity in that body. Moreover, as a general principle, the making of majority decisions rather than a requirement of unanimity seems to be the path of progress for the League.

The attitude of the conference seemed to contradict the contention of those persons who predicted that the existing members were so anxious to secure American adhesion to the Court that they would permit us to come in under any and all conditions that we might lay down. The confer-

ence, as already noted, was willing to concede to the United States a position of equality with the other members, but not a position of superiority. It drew up a joint reply to this effect, accepting the American reservations if they merely gave us equality, but reserving the right by a two-thirds vote to withdraw such acceptance if it turned out that they gave us a privileged status or superior position. At the same time the conference suggested "such further exchange of views as the Government of the United States may think useful." It would seem that the difficulty encountered by the conference in accepting the American reservations unconditionally might have been resolved by a definite and straightforward statement from our Government that we claim and expect no more than a position of equality with the other members of the Court. If this is all we desire, then it would seem that the President and Senate might have accepted the reply of the conference of signatories as satisfactory. President Coolidge, however, in his Armistice Day (1926) address indicated that the conditional acceptance of our reservations by the conference of signatories was unacceptable. "While," he said, "no final decision can be made by our Government until final answers are received, the situation has been sufficiently developed so that I feel warranted in saying that I do not intend to ask the Senate to modify its position."

Under these circumstances, certain members of the Senate who were opposed to American entrance into the Court under any conditions endeavored to secure the adoption of a resolution designed to rescind the original resolution of adherence. In February, 1927, however, the rescinding resolution was defeated in the Senate by a vote of 59 to 30. The Administration was urged to resume negotiations so as to overcome the impasse, and in February, 1928, Senator Gillett of Massachusetts introduced in the Senate a resolution suggesting to the President "the advisability of a

order to establish whether the differences between the United States and the signatory states can be satisfactorily adjusted."

The initiative in reopening negotiations was taken by the United States early in 1929. This action may have been influenced in part by the signature on our part of the Kellogg-Briand Pact for the renunciation of war, by the election in 1928 of Mr. Charles Evans Hughes as a member of the Court, and by the appointment of a committee of jurists to draft amendments to the statute of the Court. Mr. Elihu Root was a member of this committee. As a result of the reopening of negotiations, this committee was charged also with drafting a plan for the accession of the United States on conditions satisfactory to all concerned.

#### THE ROOT PLAN

The Root formula for solving the difficulty connected with American accession to the Court was discussed by a sub-committee of jurists consisting of Mr. Root, Sir Cecil Hurst of Great Britain and others. It was known officially as the "protocol for the accession of the United States to the protocol of signature of the Statute of the Permanent Court of International Justice." It was referred to a second conference of signatories, which met in September, 1929, and was adopted without change. In order to come into effect, it had to be ratified not only by the United States but also by all the states that are members of the World Court.

The protocol undertook to meet the various objections raised by the United States. Thus, it provided that the United States should be admitted to participate, upon an equality with the members of the League of Nations, in all proceedings in the Council or Assembly of the League for the election of judges of the Court. This seems to involve a legal relationship with the League of Nations,

and is thus contradictory to the first Senate reservation of 1926, but to that extent the United States was apparently willing to admit an exception to the principle of the reservation. Again, the protocol provided that the United States might at any time withdraw from the Court. It further provided that the statute of the Court could not be amended without the unanimous consent of the contracting states, and that the advisory opinions of the Court should be rendered in public session after notice and hearing.

The most important part of the Root formula was that which undertook to meet the objection raised by the second part of the Senate's fifth reservation of 1926, which prohibited the Court, without the consent of the United States, from entertaining "any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." The formula provided for a possible exchange of views between the United States and the Council or Assembly of the League regarding any proposal for obtaining from the Court an advisory opinion which the United States claims affects its interests. The formula then declared that "with regard to requesting an advisory opinion of the Court . . . there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a member of the League of Nations in the Council or in the Assembly." Finally, it was provided that "if, after the exchange of views (mentioned above), it shall appear that no agreement can be reached and the United States is not prepared to forego its objection, the exercise of the power of withdrawal . . . will follow naturally without any imputation of unfriendliness or unwillingness to coöperate generally for peace and goodwill."

The Root plan, as embodied in the report of the committee of jurists, was accepted by the Council of the League, which authorized its transmission to the United States

and to the signatory states and also directed that it should be presented to the League Assembly. At this juncture, Secretary of State Stimson gave out a statement approving the Root plan and declaring that "it would effectively meet the objections represented in the reservations of the Senate and would constitute a satisfactory basis for the adherence of the United States." The Root plan was accepted by the League Assembly and by the conference of signatories. President Hoover recommended that we join the Court under the Root plan and urged that the Kellogg-Briand Pact for the renunciation of war, because it commits its signatories to the pacific settlement of disputes, "renders the World Court more vitally important than ever before." On December 9, 1929, the United States signed the protocol of accession of the World Court as provided under the Root plan and also, on the same date, signed the original protocol of signature of the Court statute, and the protocol for the amendment of the statute. It remained necessary, however, to obtain Senate ratification of such action.

The protocols were submitted to the Senate by President Hoover in December, 1930, but without decisive result. At the opening of Congress in the following year, he reiterated his recommendation for favorable Senate action on the protocols "as a material contribution to the pacific settlement of controversies among nations and a further assurance against war." The 1932 platforms of both the Democratic and Republican parties again endorsed American membership in the Court, but opposition in the Senate remained formidable. At the beginning of his administration, President Roosevelt was apparently too much engrossed in the problems of domestic legislation and administration incident to the economic depression to devote serious attention to the question of American accession to the Court. Early in 1935, however, he began to put some pressure on the Senate to take action and the Senate Com-

mittee on Foreign Relations, by a divided vote, submitted a report recommending ratification. The President, while apparently not putting the whole weight of the Administration behind the proposal, transmitted a short message stating that "at this period in international relationships, when every act is of moment to the future of world peace, the United States has an opportunity once more to throw its weight into the scale in favor of peace." On January 29, 1935, the final vote was taken in the Senate, showing 52 in favor of adherence and 36 opposed, thus falling 7 votes short of the necessary two-thirds required for ratification.

This result was due to several causes. In the first place, all the isolationist forces in the country united in a solid phalanx and bombarded senators with telegrams and, in other ways, placed enormous pressure on the Senate to defeat ratification. On the other hand, the adherents of ratification were unable to mobilize their forces with equal effectiveness, partly because public opinion was confused by the complicated nature of the proposal. Moreover, resentment against European nations for failure to pay the war debts and the unsettled condition of affairs in Europe, Asia, and Africa, making it seem that another world war was imminent, undoubtedly were influences leading many persons to believe that the time was not propitious for the United States to become involved in even the mild foreign complication of membership in the World Court.

Although the United States thus, for the time being, failed to become a member of the World Court, one of its citizens has from its inception been one of its judges. In 1935 Judge Frank B. Kellogg resigned. Late in that year, Manley O. Hudson, an American international lawyer and a leading authority on the Court, was nominated to fill the vacancy and in October, 1936, was elected and took office.

Opposition in the Senate to American membership in



the Court is probably due in part to the feeling that if this step were taken, other steps would follow in the direction of a larger degree of international coöperation. When we got into the Court and found that that did not hurt us, the way would be opened up for less hesitating coöperation with the League of Nations. If the United States were a member of the League, there would be no question or difficulty about joining the Court. The United States was the first nation to attempt to join the Court while at the same time attempting to steer entirely clear of the League. This was found to be difficult, both practically and juridically.

In spite of being temporarily side-tracked, the question of American adhesion to the Court is still one of the most important connected with our foreign relations. It is true that its importance may be artificially exaggerated if our membership in the Court is regarded as a means of preventing war. Since justiciable questions are not usually those likely to precipitate war, the Court has only a limited utility in this respect. Almost any international dispute, however, may contain the seeds of international discord likely to grow into war if not settled. Consequently, it is a mistake to belittle the Court as of no utility in preventing war.

In view of the slightness of the obligation that the United States would incur in becoming a member of the Court, the objections against this step seem of little weight. Aside from paying a fair share of the general expenses of maintaining the Court, there would be no legal obligation. Even as a non-member, the United States can take cases to the Court, while, on the other hand, as a member it would be optional with us whether we submitted to the jurisdiction of the Court or not. It might be supposed, therefore, that the question of our membership is of little practical importance. This, however, is a mistake. If the United States is to play a part commensurate with its importance as a member of the family of nations, it is necessary for it to

find a basis of coöperation with the other nations of the world. Joining the World Court is one of the most obvious steps in this direction. Our membership in the Court would be valuable at least as a gesture indicating our willingness to coöperate with other nations to the extent of assisting to maintain by collective international action a world tribunal for the settlement of international disputes.

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## CHAPTER X

### THE UNITED STATES AND PEACE

UNDER this general head we may consider briefly (1) the record of the United States in arbitration and peaceful settlement of international disputes, (2) the limitation of armaments, especially as exemplified in the results of the international conferences, and (3) the pact for the renunciation of war.

### THE UNITED STATES AND ARBITRATION

As a method of settling international differences, war is a remedy which is far worse than the disease. Bitter experience has demonstrated that when nations go to war, no one is the winner but all are losers. Hence the vital need for devising and perfecting methods for the peaceful settlement of international disputes. Whenever such disputes arise the first resort is to diplomacy, but if this fails, other means of settlement may be adopted, among the most prominent of which are arbitration and conciliation. The former provides for settlement by a tribunal whose decision is binding. In conciliation, as well as in mediation and inquiry, the report or suggestion is not binding on the parties. Arbitration may be defined as a judicial process for the determination of international disputes through the decision of one or more umpires chosen by the parties. The signatories of the Hague Convention declared that "international arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of respect for law." Although com-

promise undoubtedly sometimes enters into the decision of arbitrators, the process, as a rule, is probably as much judicial in character as in the case of decisions by ordinary courts.

Prior to the establishment of the Permanent Court of Arbitration under the Hague Convention of 1899, when nations desired to resort to arbitration it was necessary for them by special treaty to construct an arbitral tribunal for the occasion. The beginning of modern international arbitration is found in the Jay Treaty of 1794 between the United States and Great Britain. Under this treaty three arbitration commissions were set up, one to settle the Northeastern boundary line, and two to pass on the respective pecuniary claims of British and American citizens.

At the conclusion of the war with Mexico in 1848, the Treaty of Guadalupe Hidalgo was concluded, by Article XXI of which it was provided that in case any disagreement should arise between the two governments not capable of settlement by diplomacy, they should consider the solution of the difficulty by the method of arbitration, and should one party suggest this method, it should be acceded to by the other unless entirely incompatible with the nature of the difference. When, however, in 1914 a dispute arose between the two countries over the nature of the amends which Mexico should make on account of certain indignities committed by Mexican soldiers against the American flag and uniform, our Government declined to accede to the Mexican proposal that the dispute be submitted to arbitration under the provision of the Treaty of 1848. On the contrary, we resorted to reprisals in the capture and temporary occupation of Vera Cruz.

Again, in 1927, the dispute between the United States and Mexico over the latter's land and oil laws, which our Government claimed to be retroactive and confiscatory, became acute. A widespread demand arose among the more liberal-minded citizens and newspapers in the United States that

this question, which was apparently justiciable in character, should be submitted to arbitration. Even the Senate, ordinarily not especially favorable toward arbitration, passed by a unanimous vote a resolution approving the arbitration of the dispute. The Administration apparently wavered for a time but finally took a stand against arbitration.

#### THE "ALABAMA" CLAIMS DISPUTE

The *Alabama* was one of several Confederate cruisers fitted out in British waters during the Civil War and designed to prey on the commerce of the United States. In this design they were so successful that after the war was over the American Government presented to Great Britain large claims for damages. Although these claims were persistently pressed for several years, the British Government at first denied all responsibility and, in response to our suggestion that the claims be submitted to arbitration, intimated that to do so would be inconsistent with British national honor. When, however, conditions on the Continent became disturbed and there appeared to be a possibility that England might be drawn into the Franco-Prussian War, she adopted a more conciliatory attitude. She did not wish to run the risk that, in the event of war, the United States might retaliate by fitting out "*Alabamas*" to prey on British commerce. A treaty was therefore drawn up and signed at Washington in 1871, providing, among other things, for the submission of the *Alabama* claims to arbitration. The arbitration tribunal was to consist of five commissioners of whom the parties each appointed one and the other three were appointed by other governments.

The Treaty of Washington contained an expression by Great Britain of regret for the depredations committed by the *Alabama*. It also undertook to lay down three rules defining the duties of neutrals. These were that a neutral

government is bound (1) to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel intended to cruise or carry on war against a power with which it is at peace; (2) not to permit either belligerent to use its ports or waters as a base of naval operations; and (3) to use due diligence to prevent these things from being done. By recognizing these rules as the law which the arbitration commission should apply to the decision in the matter, Great Britain practically yielded her case, and dissipated any doubt that the award would go against her. Our Government at first seemed disposed to push claims not only for direct, but also for indirect, damages. When, however, such an extreme claim seemed likely to disrupt the meeting of the commissioners, Charles Francis Adams, our commissioner, withdrew it. Thereupon, the commission, meeting in Geneva, Switzerland, in 1872, awarded damages to the United States to the amount of \$15,500,000, which was paid by Great Britain a year later.

The happy settlement of these claims and the successful outcome of the arbitration greatly stimulated in the United States interest in this method of settling international disputes. This was evidenced by the passage in 1874 in both houses of Congress of resolutions favoring international arbitration as a substitute, as far as possible, for war. Again, in 1890, a concurrent resolution was passed by the two houses of Congress requesting the President to invite negotiations with other governments looking toward the settlement of disputes by international arbitration. Presidents Cleveland and McKinley, in messages to Congress, went on record as in favor of this method of settling international differences. Nevertheless, when, in 1898, a controversy arose with Spain as to the responsibility for the destruction of the battleship *Maine* in Havana harbor, her proposal that the matter be submitted to arbitration elicited no favorable reply from our Government. Likewise, in

1903 Colombia suggested that her controversy with the United States over the Panama affair be submitted to arbitration, but the suggestion was rejected by our Government on the ground that the questions at issue were of a political nature. It appears, therefore, that our practice of arbitration has not always been fully equal to our professions. In the case of a powerful nation, such as Great Britain, we have been anxious to arbitrate, whereas in the case of relatively weak countries, such as Spain and the Latin-American republics, our attitude has at times been quite different.

#### THE SENATE AND ARBITRATION TREATIES

Since the end of the last century one of the principal obstacles in the way of the adoption of arbitration treaties by the United States has been the unsympathetic attitude of the Senate. An arbitration treaty drawn up with Great Britain after long and careful negotiations was rejected by the Senate in 1897 in spite of the fact that it had been supported by both Presidents Cleveland and McKinley. It is true that the Senate approved the Hague Conventions of 1899 and 1907 but only after the insertion of reservations designed to safeguard the Monroe Doctrine and its own treaty-making power. By the first of these conventions, the so-called Permanent Court of Arbitration was provided for, resort to which, however, was optional.

Beginning in 1904, President Roosevelt and his Secretary of State, John Hay, secured the signing of a series of arbitration treaties with France, Great Britain, and a number of other powers. They provided for the submission to the Hague Court of disputes of a legal nature and those relating to the interpretation of treaties, but excepted even from this restricted field questions affecting the vital interests, the independence, or the honor of the parties, or the interests of third powers—"in effect, every question

concerning which there could be a serious difference.”<sup>1</sup> As originally drawn, these treaties provided that before appealing to the Hague Court, the parties should conclude a special agreement clearly defining the matter in dispute and the scope of the arbitrators’ powers. The Senate amended this provision by substituting the word “treaty” for “agreement.” This change meant that the consent of the Senate would have to be secured before any dispute could be submitted to the Hague Court. This so incensed President Roosevelt that he allowed the treaties to drop. He declared that in their amended form they would not in the smallest degree facilitate settlements by arbitration; that, in effect, they merely recited that our Government will, when so disposed, hereafter enter into arbitration treaties; and that they “amount to a specific pronouncement against the whole principle of a general arbitration treaty.”

Nevertheless, in 1908, Mr. Elihu Root having meanwhile become Secretary of State, these treaties were again taken up and adopted in the form in which the Senate had amended them. Some of these treaties are still in force. The result, as Professor J. B. Moore has pointed out, is that “it is in practice now more difficult to secure international arbitration than it was in the early days of our independence,” for, “prior to 1908 the United States constantly arbitrated pecuniary claims against foreign governments without concluding a formal treaty.”<sup>2</sup> Moreover, the value of the treaties is minimized by the “weasel words” vital interests and honor. Presumably, each nation settles for itself whether a particular dispute affects its honor and vital interests. Almost any dispute might conceivably be brought within these categories. This represents a step backwards, for, as we have seen, Great Britain

<sup>1</sup>J. B. Moore, *Principles of American Diplomacy*, 330.

<sup>2</sup>*Principles of American Diplomacy*, 331; *International Law and Some Current Illusions*, 86.



consented to arbitrate the *Alabama* claims which she at first refused to do on the ground that the dispute affected her honor.

In 1911 another group of treaties, known as the Taft-Knox Treaties, was negotiated. They abandoned the exceptions of vital interests and honor and undertook to bring within the scope of arbitration all differences "which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law and equity." Provision was made for a joint high commission of inquiry which should decide the preliminary question as to whether a particular dispute was justiciable in case of disagreement between the parties. The Senate eliminated this provision on the ground that it encroached on the Senate's constitutional power. The Senate also inserted a reservation prohibiting the submission to arbitration of

"—any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several states, or the territorial integrity of the several states or of the United States or concerning the question of the alleged indebtedness or monied obligation of any state of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy."

President Taft was so displeased with the action of the Senate that he let the treaties drop. Afterwards he explained his action by saying that the Senate had "truncated them and amended them and qualified them in such a way that their own father could not recognize them . . . So I put them on the shelf and let the dust accumulate on them in the hope that the Senators might change their minds, or that the people might change the Senate; instead of which they changed me."

The divergence of view between the President and the Senate regarding the arbitration treaties with the resulting failure of the treaties was not due so much to a disagreement over the merits of arbitration as a method of settling international differences as to a jealous contest for power between the two departments of government. The increasing importance of the United States as a world power was tending to enhance the influence and prestige of the President, which the Senate desired to check. Such a situation is one of the penalties we have to pay for having applied in our government the principle of the separation of powers. The departments of government are merely means or agencies for the accomplishment of certain common ends. Yet the end is sometimes lost sight of in the struggle between the rival agencies. The fact that the two departments may be controlled by different political parties tends to increase the rivalry and struggle for power between them. Such a situation would not be tolerated in a parliamentary form of government.

#### RECENT PEACE TREATIES

In 1913-14, Secretary of State Bryan succeeded in negotiating a series of about thirty treaties for the advancement of peace but along somewhat different lines from the usual arbitration treaties. The Bryan treaties are conciliation, rather than arbitration, treaties. They were known as "wait-a-year" or "cooling-off" treaties. They provide for the establishment of a permanent international commission to which all disputes of every nature whatsoever which diplomacy shall fail to adjust shall be submitted for investigation and report. It is further provided that the report of the commission shall be completed within one year. The report does not have to be accepted by the parties, and after it has been made they are at liberty to go to war over the dispute if they so desire. The im-

portant point is that pending the investigation and report they agree not to declare war or begin hostilities. The Senate approved the treaties after eliminating a provision which appeared in some of them to the effect that, pending the report of the commission, the parties agree not to increase their military or naval programs unless menaced by a third power.

The theory of the Bryan treaties is the perfectly sound one that, when a controversy arises, if the parties can be induced to wait a year before resorting to arms, the intervening period will allow hot feelings to subside so that in all likelihood war will be avoided. As has been pointed out, "the underlying thought is three-fold: (1) that they furnish an honorable means of suspending controversy; (2) that the suspension of controversy will tranquillize the minds of the disputants; and (3) that the report of the commission of investigation probably will point the way to a fair and equitable adjustment."<sup>1</sup>

Another valuable feature of the Bryan treaties is that they undertake to provide a continuously existing commission which will be already established and available when a controversy arises. This renders it unnecessary to create a special commission at the very time when feelings are inflamed. Unfortunately, not all of the commissions provided for by the treaties have been appointed and even when appointed vacancies in them have frequently not been filled. Moreover, none of the commissions has ever functioned.

Germany was one of the powers which accepted the Bryan treaties in principle, but never went further with the project. The explanation is found in the following account of an interview between the German Kaiser and Mr. E. M. House, representing President Wilson. Mr. House states:

"I forgot to say that I asked the Kaiser why Germany refused to sign the Bryan treaty providing for arbitration

<sup>1</sup> J. B. Moore, *International Law and Some Current Illusions*, 92.

(sic) and a cooling-off period of a year before hostilities could be inaugurated. He replied: 'Germany will never sign such a treaty. Our strength lies in being always prepared for war at a second's notice. We will not resign that advantage and give our enemies time to prepare.'"<sup>1</sup>

More recently, a new series of conciliation treaties on the Bryan model have been negotiated. They differ from the earlier treaties in authorizing the permanent commission spontaneously to offer its services of investigation and report.

In 1928 the Root treaty of 1908 with France expired, and in its place a new treaty was negotiated and signed which follows somewhat new lines and has served as a model for nearly thirty new arbitration treaties with other countries. The French treaty of 1928 provides for the submission to arbitration of justiciable disputes arising between the two countries not susceptible of settlement by diplomacy nor by the permanent international commission set up by the Bryan conciliation treaty of 1914. The Root treaty had excepted from the obligation to arbitrate questions affecting "national honor and vital interest." As already noted, almost any dispute is capable of being considered one affecting national honor, so that with these exceptions incorporated the treaty is largely vitiated and its purpose nullified. These exceptions are now apparently considered obsolete, for the French treaty of 1928 omits them. This constitutes its most striking improvement over the Root treaty. On the other hand, the new treaty excepts from the obligation to arbitrate questions of "domestic jurisdiction" and those involving the Monroe Doctrine. Like national honor, the phrase "domestic jurisdiction" is difficult to define. The treaty is further weakened by the fact that, prior to the arbitration of any particular dispute, a special agreement or *compromis* defining the question at

<sup>1</sup> C. Seymour, *Intimate Papers of Colonel House*, I, 256, quoted in *World Peace Foundation Pamphlets*, Vol. IX, Nos. 6-7, p. 545.

issue must be entered into, and this special agreement must be submitted to the Senate for approval. In view of these weakening provisions the new treaty can hardly be considered as a very important step in advance. It falls considerably short of the point reached in arbitration treaties signed by some of the Scandinavian states which provide for the submission of all legal disputes to judicial settlement by the Permanent Court of International Justice and of all other disputes to arbitration.

It is obvious, as already noted, that the provisions of our arbitration treaties and our actual practice in pacific settlement sometimes fall short of our professions and national aspirations in this direction. In this respect we have been considerably behind some of the European nations. What is the explanation of our backwardness? In part, it is doubtless due to the rivalry between the President and the Senate and to the tenacity with which the Senate clings to what it considers its constitutional prerogatives in treaty-making. More fundamentally, however, it is due to the great increase in our power and interests. When the United States was young and comparatively weak, it naturally placed more emphasis on arbitration and peaceful settlement than it does today. The same tendency is noticeable in the world generally—that small and weak nations more readily agree to arbitration than do the large and powerful ones. If it should come to the test of force, small nations could not protect their interests against the large nations. Hence, the attitude of small nations toward arbitration and peaceful settlement is more favorable. In the future, however, the more the rule of right prevails over mere might in international relations, the more the attitude of large nations, including the United States, toward arbitration and pacific settlement may be expected to approach, if not to coincide with, that of the small and weak nations.

That some progress in this direction has been made by the United States is indicated by the more conciliatory

attitude toward Latin-American countries which it has adopted in recent years. The United States has ratified several treaties of inquiry, conciliation, and arbitration with Latin-American countries. Among these is the so-called Gondra Convention drawn up at the Fifth Pan-American Conference at Santiago de Chile in 1923. This treaty follows the plan of the Bryan conciliation treaties. It provides for the setting up of two permanent commissions, one at Washington and one at Montevideo, composed of the three American diplomats longest accredited at these capitals. A party to a dispute may request one of these commissions to convoke a special commission of inquiry. The noticeable innovation in this treaty is that Latin-American nations would be able to control the determination of the dispute. It is to be noted, however, that, although the report of the special commission might have moral force, it would not be legally binding on the parties.

In 1929 two conventions were drawn up at a special conference of American states held in Washington. These were the General Convention of Inter-American Conciliation and the General Treaty of Inter-American Arbitration. The former supplements the Gondra Convention of 1923 by adding conciliation to inquiry. It confers conciliatory jurisdiction upon both the permanent and the special commissions provided for by the Gondra Treaty. The arbitration treaty of 1929 provides for the arbitration of disputes of a juridical nature, along the lines of the series of arbitration treaties launched by the United States in 1928. It excepts disputes of a domestic nature and those which affect third parties. This treaty was ratified by the United States Senate, with a reservation requiring its advice and consent to any special arbitration agreement.

Finally, the United States is a party to the Argentine Anti-War Treaty of 1933. This is a non-aggression pact which pledges the parties to seek to settle their disputes by pacific means. It provides that the parties "shall recog-

nize no territorial arrangement not obtained through pacific means, nor the validity of an occupation or acquisition of territory brought about by armed force." In case of non-compliance by any state with these obligations, the parties agree to "adopt in their character as neutrals a common and solidary attitude . . . but will in no case resort to intervention either diplomatic or armed," provided this undertaking is compatible with other treaty obligations. This treaty is similar in several respects to the Kellogg-Briand Pact of Paris, which we shall now consider.

#### THE PACT OF PARIS

From one point of view war in the international body politic may be considered as a pathological condition analogous to disease in the human body. Just as modern measures for the control of disease, especially those of a contagious character, emphasize prevention rather than cure, so the best modern thought on the control of war is directed toward preventing it from breaking out rather than merely attempting to regulate it after it has broken out. This is especially important from the standpoint of the United States, for, as experience has demonstrated, if war becomes epidemic in Europe, it may spread to the United States. As a method of prevention, instrumentalities for the pacific settlement of international disputes as they arise are important. Still more important, however, is it to remove the deep-seated causes of war.

Among proposals looking to the prevention of war is that which goes by the name of "outlawry of war." It is generally recognized that war cannot be prevented simply by a resolution declaring it a crime, any more than can murder or highway robbery. In both cases, some machinery of enforcement is essential. Moreover, it would of course be impossible to outlaw war by the action of one or two nations. For this purpose there must be a general

agreement among the civilized nations of the world not to resort to war as a means of settling international disputes. Such an agreement, however, would of course not abolish the right of self-defense. Self-preservation, as has often been said, is the highest law, and no nation can be expected to renounce the right to defend itself if attacked. In view, however, of the military maxim that attack is sometimes the best defense, the scope of this right of self-defense should be carefully defined.

It should be noted that the term "outlawry of war" is a misnomer. The only way to deal with an outlaw is by force, which in the case of a nation would mean war. It is better to speak of the proposal as one for the renunciation of war as a means of settling international differences. Since such differences, however, will nevertheless arise, some other method of settling them must be found, such as arbitration, diplomatic compromise, or judicial determination. An international court with compulsory jurisdiction over not only justiciable but also so-called political disputes would seem to be an essential feature of the plan for the outlawry of war.

Although the adoption of a general treaty among the nations outlawing war may tend to crystallize and energize the peace sentiment, the plan for outlawing war cannot be successful unless based upon a widespread and powerful international public opinion that war is an unnecessary evil which ought to be abolished. In addition to scrapping battleships, it is necessary to scrap the war mind, and to substitute therefor a peace mind strong enough to control governmental action. Without this, a treaty outlawing war would probably turn out to be a mere futile gesture. As has been well said, "It is a fundamental weakness of 'outlawry' that it treats war as if it were merely a means of settling disputes, a means that has only to be collectively put aside by solemn resolution. On the contrary, war is a means by which powerful nations get, or attempt to get,



what they want, and it will pass into disuse only when, through a spiritual regeneration, nations renounce it as a method of getting what cannot be secured by ethical means."<sup>1</sup>

The proposal for the outlawry of war, previously widely regarded as a mere dream of a few visionaries, was given definite official support, when in April, 1927, Foreign Minister Briand of France proposed that France and the United States should publicly subscribe to a mutual engagement tending to outlaw war as between these two countries. This proposal received comparatively little attention until near the close of that year, when negotiations began between Secretary Kellogg and French Ambassador Claudel with the object of embodying the proposal in the terms of a definite treaty. The administration was represented as being somewhat doubtful as to whether the United States Government could constitutionally enter into a treaty renouncing war, in view of the fact that the Constitution assigns to Congress the power to declare war. This view, however, seems clearly to be a mistaken one. Although a treaty could not legally deprive Congress of its power to declare war, a treaty renouncing war could at least place on Congress a moral duty not to exercise its power under certain circumstances. In fact, many treaties in the past have placed such limitations on Congress, as, for example, the Bryan treaties mentioned above.

The Briand proposal had suggested merely a bilateral agreement with the United States. To our Government, however, it seemed invidious to make such an engagement with France alone without at least offering to enter into similar arrangements with other powers. Our Government accordingly suggested a multilateral treaty along these lines.

The original Briand proposal had suggested a renunciation of war without regard to whether it were defensive

<sup>1</sup> *The New Republic*, LIII, 252.

or aggressive. In subsequent negotiations, however, the French Government insisted that the right of self-defense should be preserved and that each nation should determine when it was necessary to take measures in self-defense. Secretary Kellogg admitted that this right is fundamental and cannot be abridged by treaty.

Unless the right of self-defense were reserved, few if any nations would have been willing to adhere to the treaty. How far this reservation undermined the value of the treaty may be gathered from the fact that nations seldom, if ever, go to war except ostensibly on the ground of self-defense. A nation's diplomats can usually make it appear, at least to the satisfaction of their own people, that any war entered upon is one of defense.

The British Government supported the French view as to the necessity of safeguarding the right of self-defense and the obligations under the Covenant of the League of Nations and Locarno. It also asserted a British Monroe Doctrine in the statement that "His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in certain regions of the world the welfare and integrity of which constitute a special and vital interest of our peace and safety." Where these regions are located, however, was not specified. Secretary Kellogg made no direct comment on the British Monroe Doctrine, which seemed to constitute a tacit acceptance of this interpretation. It was understood, however, that these interpretations should in the main not be placed in the body of the text of the treaty.

As a result of these negotiations agreement was finally reached whereby fifteen nations were to become original signatories of the pact, and the other independent nations of the world were to be invited to adhere. The pact was finally signed at Paris on August 27, 1928, but it was arranged that deposit of ratifications should be made in

Washington. All but five of the independent nations of the world had, by the end of that year, either adhered to the pact or indicated their intention to do so. At the opening of Congress in December, 1928, President Coolidge sent the draft of the treaty to the Senate and expressed the hope that it would receive the approval of that body. Omitting the preamble the text of the two principal articles of the treaty is as follows:

1. "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

2. "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

By a vote of eighty-five to one the Senate in January, 1929, gave its approval to the treaty for the Renunciation of War. This action followed the presentation to the Senate of a report from its Committee on Foreign Relations expressing the Committee's understanding as to the meaning of the treaty. In part this report was as follows:

"The United States regards the Monroe Doctrine as a part of its national security and defense. Under the right of self-defense allowed by the treaty must necessarily be included the right to maintain the Monroe Doctrine, which is part of our system of national defense."

"The committee further understands that the treaty does not provide sanctions, express or implied. Should any signatory to the treaty or any nations adhering to the treaty violate the terms of the same, there is no obligation or commitment, express or implied, upon the part of any of the other signers of the treaty to engage in punitive or coercive measures as against the nation violating the treaty. The effect of the violation of the treaty is to relieve the

other signers of the treaty from any obligation under it with respect to the nation thus violating the same."

The report thus presented to the Senate was not acted upon by that body and was not intended to modify the treaty nor to constitute a reservation to it.

In July, 1929, the Kellogg pact was proclaimed to be in force.

#### EVALUATION OF THE KELLOGG PACT

By those who desire that the United States should engage in a larger measure of international coöperation, the Kellogg pact was hailed as an important step in this direction. It was felt that, as a result of American participation in such a treaty, the support of the United States would be enlisted in coöperative action against any nation which goes to war in violation of the pact. There are, however, no express sanctions contained in the pact. As far as its language is concerned, if one nation violates the pact the other signatories do not undertake to do anything about it. In this respect the Kellogg pact does not go as far as the Covenant of the League of Nations. Senator Borah was quoted as saying that "it is quite inconceivable that this country would stand idly by in case of a grave breach of a multilateral treaty to which it is a party." He admitted, however, that our Government must reserve the right to decide whether the treaty has been violated and, if so, what coercive measures it shall take. The position of the Coolidge administration was that the taking of coercive measures by the United States will be permitted but not required. The pact does not alter the legal relations between the United States and the League, but, from a practical point of view it may bring the United States into closer coöperation with the members of the League in accomplishing one of the purposes of the League, viz., the prevention of aggressive war.

It has been thought, in some quarters, that the signing and ratification of the Kellogg pact must logically be followed by greatly accelerated progress in the direction of general disarmament. This view was expressed by the German and Russian governments and also by some prominent citizens in the United States, such as President Nicholas Murray Butler. This view, however, did not seem to be shared by the Government at Washington, as was shown through the passage by Congress in February, 1929, of the bill authorizing the President to undertake, prior to July, 1931, the construction of fifteen cruisers and one aircraft carrier. This action, coming so soon after the approval by the Senate of the Kellogg Pact for the Renunciation of War, was criticized by some persons as inconsistent. However, the bill contained a loophole in the provision that "in the event of an international agreement, which the President is requested to encourage, for the further limitation of naval armament, to which the United States is signatory, the President is hereby authorized and empowered to suspend in whole or in part any of the naval construction authorized under this act." Under this provision President Hoover, shortly after the issuance in July, 1929, of a proclamation declaring the Kellogg pact to be in force, announced that he had directed the work on that year's cruiser construction program to be suspended.

It is true of course that our action in signing the Kellogg pact is not inconsistent with maintaining armaments sufficient for self-defense. If no nation armed aggressively, our armaments might be still further reduced. But we know that even the most solemn compacts may be broken. Nevertheless, it would seem that the general tendency of the Kellogg pact is in the direction of limitation of armaments, although real progress in this direction will require a distinct general agreement.

Another question that may be raised is one concerning the relation between the Kellogg pact and the Monroe

Doctrine. It is unlikely that the administration at Washington would enter into a multilateral treaty inconsistent with the maintenance of the Doctrine. Nevertheless, under the Doctrine we have been called upon to land marines in Latin-American countries or to engage in other warlike operations for the protection of the person and property of American or European citizens. Do such operations constitute war in the sense in which the word "war" is used in the Kellogg pact? Although there is no official definition of war either in the text of the pact or in the various interpretations, it seems clear that the language of the pact is not officially construed as broad enough to restrain us from sending military or naval expeditions into Central America. Great Britain, by insisting on a Monroe Doctrine of her own, is precluded from objecting to ours. Moreover, it might be argued that the reservation regarding the right of self-defense leaves the United States free to take such positive military measures as it has taken under the Monroe Doctrine.

The Kellogg pact may be criticized on the ground that, while undertaking to renounce war, it does nothing to remove the causes of war. The renunciation of war does not, in and by itself, prevent international disputes from arising. If they can no longer be settled by war, then stronger means of pacific settlement than now exist should be provided. Some of the boundary lines of European countries, as at present fixed, are deemed inequitable by the countries concerned. Their sense of injustice over this condition may lead to war in violation of the pact, but the pact itself supplies no machinery for the peaceful settlement of such international difficulties. In order to supply this need, the World Court should be strengthened by the adhesion of the United States and by the wider acceptance among the great powers of the optional clause for compulsory jurisdiction. Stronger treaties of arbitration and conciliation should also

be adopted for the settlement of disputes of a non-justiciable character.

It is possible to find so many loopholes in the Kellogg pact that, from the legal point of view, it may be considered a mere futile gesture. It may even be considered as not only futile, but positively harmful as giving international validity to wars of defense. Furthermore, by leaving to the nation concerned the right to determine whether its war is one of defense, this loophole virtually legalizes all wars. Such a legalistic view, however, should not be allowed to obscure the moral force of the pact, wherein lies, perhaps, its greatest significance. By putting the nations definitely on record against war, it causes people to think in terms of peace and it gives the growing peace sentiment among peoples of all nations definite support in those crises when threats of war are heard. Thus the Kellogg pact may find some value in serving as a means whereby public opinion may insist on the observance by governments of its demands that peace be preserved.

In proclaiming the pact to be in force, President Hoover declared:

"I dare predict that the influence of the treaty for the renunciation of war will be felt in a large proportion of all future international acts. The magnificent opportunity and the compelling duty now open to us should spur us on to the fulfilment of every opportunity that is calculated to implement this treaty and to extend the policy which it so nobly sets forth."

President Hoover, in his desire to "implement the treaty" was hardly in harmony with the views of the Senate committee, which, as indicated by its report, seemed to be of the opinion that the treaty places us under no obligation to interfere in the wars of other nations. In a joint statement issued by President Hoover and Prime Minister MacDonald of Great Britain in October, 1929, it was declared that "both our governments resolve to accept

the peace pact not only as a declaration of good intentions but as a positive obligation to direct national policy in accordance with its pledge." In this respect, President Hoover aligned himself with the more advanced thinkers on this matter. The latter feel that the United States is morally obligated not to give economic assistance to a nation which enters upon an aggressive war in violation of the pact. In other words, the pact has changed the situation, so that the United States no longer has the option of remaining strictly neutral and allowing such aggressor nation to purchase supplies from us. This view was held by Senator Capper of Kansas who in February, 1929, introduced a resolution in the Senate providing that "whenever the President determines and by proclamation declares that any country has violated the multilateral treaty for the renunciation of war, it shall be unlawful, unless otherwise provided by act of Congress or by proclamation of the President, to export to such country arms, munitions, implements of war or other articles for use in war until the President shall by proclamation declare that such violation no longer continues."

It was hardly expected that this resolution would be passed but merely that it would stir up discussion. It will be noticed that it contemplates merely an economic boycott and does not contemplate the exercise of any military force by us against the aggressor. It would place a heavy responsibility upon the President, as he would be likely in most cases to find it an embarrassing and difficult task to determine which of two warring nations is the aggressor. A party to any war who is not an aggressor has not of course violated the pact. An alternative to giving this task to the President would be to accept the decision of the Council of the League as to which nation is the aggressor, but our Government is evidently unwilling to go that far.

In this connection may be mentioned the less far-reaching resolution introduced in the House by Representative



Porter, Chairman of the Committee on Foreign Affairs. This resolution would authorize the President to prohibit the exportation of arms or munitions of war from the United States to China or Latin-American countries whenever conditions of domestic violence or international conflict exist or are threatened in such countries.

Secretary of State Kellogg, in a statement made shortly after the introduction of the Capper and Porter resolutions, declared that in his opinion the anti-war pact was not a mere gesture but rather an instrument that would make it more difficult for nations to declare war. "It is," he said, "a rallying point for the mobilization of world opinion." He added that "the only enforcement behind the treaty is the public opinion of the people." He thus apparently aligned himself with those who think that the pact is of great importance as the embodiment of a moral principle, but do not favor implementing it with economic or other sanctions.

The impotency of mere public opinion to enforce it has been demonstrated in subsequent tests.

The first application or test of the Kellogg pact came in connection with the conflict in Manchuria between China and the Soviet Government of Russia. During the summer of 1929 Secretary of State Stimson engaged in informal conversations with the diplomatic representatives of China, Great Britain, Japan, France, and Italy, regarding the situation in Manchuria, and endeavored to see that the attention of the Chinese and Russian governments was called to the Treaty for the Renunciation of War. The conflict in Manchuria, however, continued and finally, early in December, 1929, the United States Government appealed to the fifty-three nations, signers of the Kellogg pact, to unite in bringing the pressure of world opinion to bear in putting a stop to further hostilities and to remind China and Russia of their obligations under the pact. Most of the signatory nations, Japan being the most important ex-

ception, acceded to the request of the American Government.

Since the United States did not have direct diplomatic relations with Russia, our admonition to her was sent through the French Foreign Office. It apparently touched a sore spot with the Russian Government, her acting commissioner of foreign affairs, Litvinoff, replying indignantly and accusing the United States of performing an unfriendly act. Without directly answering this charge, Secretary of State Stimson issued a statement in which he denied that the message of the American Government was sent from unfriendly motives and declared that "between co-signatories of the Pact of Paris it can never be rightly thought unfriendly that one nation calls to the attention of another its obligations or the dangers to peace which from time to time arise."

In spite of the rebuff administered by the Soviet Government, the move initiated by the American Government seems to have accomplished some good. It indicated at any rate that the American Government feels itself to be under obligation to mobilize world opinion in behalf of the peace pact when its violation is threatened.

The Far Eastern imbroglio between China and Japan in 1931 brought about further consideration of the Kellogg-Briand pact in order to determine its applicability to this situation. The pact prohibits war as an instrument of national policy, but contains no express indication as to what sanctions should be applied in case a contracting party goes to war in violation of its provisions. It would seem that the pact should be construed as implying that, under these circumstances, the other contracting parties should at least consult with each other as to what steps might appropriately be taken to meet this situation. Prior to the invasion of Shanghai and Manchuria by Japan, the United States Government had evinced some hesitation about even going to the extent of entering into consultation with the other

powers. The situation in the Far East, however, disclosed the fact that this position was hardly tenable. Even the national party platforms, usually rather timid in dealing with questions of foreign policy, adopted in 1932 the position that consultation was a necessary corollary to the pact. Thus, the Democratic platform advocated that the pact "be made effective by provisions for consultation and conference in case of threatened violation of treaties" while the Republican platform declared that "we favor enactment by Congress of a measure that will authorize our government to call or participate in an international conference in case of any threat of non-fulfillment of Article 2" of the pact.

Shortly after the adoption of these platforms, Secretary of State Stimson made an address on August 8, 1932, before the Council on Foreign Relations in New York City in which he recognized that consultation between the signatory powers is implied whenever the provisions of the pact are threatened with violation. After recalling his note of January 7, 1932, that the United States would not recognize any situation, treaty, or agreement which might be brought about contrary to the obligations of the pact, he proceeded to declare that the pact had developed to the point where "consultation between the signatories of the pact when faced with the threat of its violation becomes inevitable." He pointed out that the pact provides for no sanctions of force but rests instead upon the sanctions of public opinion, and then declared that "any effective invocation of the power of world opinion postulates discussion and consultation." Since the pact necessarily implies consultation, he intimated that there is no need of implementing it by inserting a formal provision to that effect. He also took the position that the former concept of international law whereby, when a conflict occurred between two nations, the others could only exercise a strict neutrality alike toward the injured and the aggressor is outworn

since the adoption of the pact. Now "such a conflict becomes of concern to everybody connected with the pact."

The better view, however, is that nations still have the right to adopt a position of neutrality.

In spite of the more advanced position thus taken by our Government, the Far Eastern imbroglio disclosed certain weaknesses in the pact. That instrument does not define war and impliedly permits wars of self-defense. Every nation, when going to war, claims to be acting in self-defense and, as already pointed out, no satisfactory definition of the aggressor has yet been formulated. Japan never issued any formal declaration of war against China. Japan claimed that if her course could be denominated war, then it was one of self-defense instigated by China's economic boycott against her goods. Moreover, Japan claimed that China was so disorganized and disorderly as hardly to deserve the appellation state in the proper sense of the word and, consequently, that she was engaged not in international war but in intervention for the restoration of order,—a practice frequently indulged in by European nations in backward regions of the world.

In the light of these contentions Japan was afforded some basis for arguing that the pact was not applicable to the situation and that consequently she had not violated it.

When, in 1935, a conflict broke out between Italy and Ethiopia, Secretary of State Hull was appealed to both by the Emperor of Ethiopia and by the League of Nations. In his replies, Secretary Hull took occasion to invoke the Kellogg pact, but his statement had no effect whatever upon the conduct by Italy of her war-like operations against Ethiopia. In the Manchurian case, the Stimson doctrine of non-recognition had been formulated as a corollary of the Kellogg pact. This doctrine, however, had little effect upon the actual course of events. In the Ethiopian case, the other powers were not afforded recourse even to the

position of non-recognition of a puppet state because Italy, instead of setting Ethiopia up as a puppet state, annexed it. This situation points to the need of strengthening the pact and making it more explicit and far reaching. One suggestion for improvement, attributed to Sir John Simon, the British foreign minister, is to amend the pact so as to make it prohibit not war but all use of force for settling international disputes. This amendment might not fully meet the needs of the situation, but it would at least deprive an aggressive nation of the argument that she does not violate the pact merely because she does not issue a formal declaration of war.

#### THE LIMITATION OF ARMAMENTS

The full fruition of arbitration and judicial decision as methods of peaceful settlement of international differences ultimately depends upon the discarding of the age-old method of settlement through the force of arms. The peaceful methods of settlement may be expected to become more prevalent as armaments are reduced and men everywhere come to depend less instinctively upon force as the ultimate arbiter of international disputes. Unfortunately, the World War, which was ostensibly a "war to end war," seems to have had only a temporary effect in this direction. The extent of armaments and the cost of maintaining them among the principal world powers are greater now than in 1914. If we may judge by the rivalry among the nations to build up armaments, the interval since the World War seems merely to be regarded as an opportunity for the nations to take breath before plunging into another and more terrible conflict. Each nation is apparently feverishly building up armament on armament for fear of being left behind in the race.

No one nation can safely disarm until others do likewise, prior to the general acceptance of peaceful methods of settling international disputes. International action among

the great powers is necessary, but one nation may assume the rôle of leadership in the movement for the reduction of armaments. The Covenant of the League of Nations, as we have seen, provided that the League Council should formulate plans for the reduction of national armaments for the consideration and action of the several governments. A commission was organized under the League to consider the question, but its efforts were hampered by the lack of coöperation on the part of the United States. During the early part of President Harding's administration, the United States, as we have seen, declined to have anything to do with the League of Nations. In pursuance of this policy, whatever was done by our Government in the direction of limitation of armaments would have to be done through direct negotiation with the other principal powers and independently of the League. Consequently, in 1921 President Harding called an international conference to meet at Washington to consider the question of the limitation of armaments both on land and sea. When it appeared, however, that nothing could be done in the direction of land disarmament, the program of the Conference was afterwards limited to the consideration of naval disarmament. The leading naval powers of the world had been actively engaged in the building of ships of war. It was felt by many persons, both in public and in private life, that if the international race for increased naval armament continued, it would not only entail a huge tax burden on the citizens of the various countries but would also constitute a serious menace to the maintenance of world peace.

For what purpose were the nations engaged in such extensive naval preparations? Certainly not solely for defense, but doubtless also because of the fear of possible foreign interference in carrying out their respective national designs. Before the principal powers could be induced to limit their naval armaments, it was realized that it would be necessary to do something toward removing

causes of possible international conflict. The principal naval powers were the United States, Great Britain, and Japan. The latter two were in an alliance with each other. This alliance had formerly been directed against Germany, but after the downfall of the German navy, it seemed plausible to suggest that it might be directed against the United States, especially in Pacific waters. Consequently, in addition to the limitation of naval armament, the agenda of the Conference also included the consideration of Pacific and Far Eastern Questions.

#### THE WASHINGTON CONFERENCE

In addition to the three principal naval powers above mentioned, other leading powers which participated in the Washington Conference of 1921-22 were France and Italy. Because of their interest especially in Far Eastern matters, Belgium, Holland, Portugal, and China were also invited and attended the Conference. Although questions relating to the Far East were considered at the Conference, they were, somewhat illogically, not decided until after the matter of the limitation of naval armament had been passed upon.

In order to bring about reduction of armaments, it was realized that mutual sacrifices were necessary, and our delegation to the Conference, headed by Secretary Hughes, was prepared to lead the way in this direction by voluntarily offering to make the greatest sacrifice. The proposal of the United States, which was substantially adopted in the Five Power Naval Treaty, was that the United States and Great Britain should each be limited to approximately 500,000 tons of capital ships, while Japan should be allowed approximately 300,000 tons. This was known as the 5-5-3 ratio. In the cases of France and Italy, 175,000 tons each were allowed. In the same treaty the five powers further agreed that they would abandon their respective

capital ship building programs and that they would construct or acquire no new capital ships except for replacement purposes. The plan as agreed to also involved the scrapping of a large number of battleships of older types. By a further provision the five powers agreed not to construct or acquire any war ship of more than 10,000 tons, other than capital ships or aircraft carriers.

In addition to the above provisions, the general plan proposed by the American delegation also stipulated that the same proportionate limitation placed on capital ships should also be placed on auxiliary craft, such as cruisers, destroyers, and airplanes. Largely on account of the opposition of France, however, this proposal was defeated. This was the most unfortunate development of the Conference. The result is that no limit was placed on the number of destroyers, submarines, or airplanes which the powers may build, nor on the number of cruisers, provided they are smaller than 10,000 tons. Since some naval experts are of the opinion that capital ships are an obsolete type of fighting craft and that the wars of the future will be fought largely under the sea and in the air, the magnitude of the failure of the Conference in placing no reasonable limitation on auxiliary craft will be realized.

One further provision of the Naval Treaty should be mentioned. This was an agreement among the United States, Great Britain and Japan to maintain the *status quo* with regard to fortifications and naval bases in their respective territories and possessions in the Pacific region, with certain exceptions. As far as the United States was concerned, this agreement applied to the Philippines and Guam, but not to the Hawaiian Islands. It was doubtless this agreement in consideration of which Great Britain and Japan undertook to terminate their alliance, which was done by a provision of the Four Power Treaty, also drawn up at the Conference. The provision regarding fortifications and naval bases, as well as the provision limiting the



tonnage of capital ships, was intended to put the various powers on a basis where they would not be in a position to launch aggressive measures against each other but would retain ample means of defense.

#### THE LEAGUE AND DISARMAMENT

The Covenant of the League of Nations, as already noted, authorized the League Council to formulate plans for the reduction of national armaments. It was realized that the very existence of the League is dependent upon the maintenance of general peace, which would be seriously menaced unless the principal nations of the world could agree upon and carry out plans for the limitation of armaments. It was also realized that this problem is a difficult one, with many ramifications and requiring for its successful solution careful study and preparation. Consequently, in addition to a disarmament section in the Secretariat, a Preparatory Commission on Disarmament was created which met at Geneva in May, 1926. By this time, the United States Government had overcome to some extent its earlier prejudice against having any dealings with the League, and therefore accepted the League's invitation to participate in the work of the Preparatory Commission. It found itself, however, unable to agree with many of the views embodied in the report of the Commission. Among the proposals of the Commission with which the United States at that time disagreed was that relating to the international supervision of the administration of agreements limiting armaments. It held that such a plan is calculated to engender suspicion and ill-will, while the true foundation upon which to construct such agreements is that of international good faith and respect for treaties. The United States at that time also objected to the proposal of the Commission that military expenditures should be taken into consideration in the comparison or limitation of armaments, on account of

the fact that wage scales and standards of living, the costs of personnel and material, vary so much from country to country as to render comparison practically impossible. In contrast with the position of France and other Continental powers, who hold that the various branches of warfare on land, on water, and in the air are interdependent and must be considered as a unit, the United States holds that it is feasible to discuss limitation of these various branches separately. On account of our comparatively isolated geographical position, and since the United States has one of the smallest per capita standing armies of any of the leading powers, our delegates to the conference took the position that the matter of disarmament on land is primarily a European problem rather than one that particularly concerns us. The limitation of both land and air forces is regarded by our Government as largely regional problems, whereas the limitation of naval armament is more nearly a world-wide question.

The differences of view regarding these and other matters tended to protract the discussions of the Preparatory Commission in its efforts to pave the way for a general disarmament conference. Consequently, without waiting for that, President Coolidge called a tripartite conference on the limitation of naval armament participated in by the United States, Great Britain, and Japan. France and Italy, although invited to participate, declined to do more than send informers, who are described as a grade or species one step lower than observers. President Coolidge, in calling the conference, suggested that the reduction of naval armament be considered as a separate proposition and that the 5-5-3 ratio applied by the Washington Conference of 1921 to capital ships should be applied to auxiliary vessels—such as cruisers, destroyers, and submarines—not included under the Washington treaty.

The conference met at Geneva in June, 1927, but unfortunately was not able to come to an agreement. This was

partly due to the failure of France and Italy to participate fully, but more largely to the lack of ability on the part of the delegates to make mutual sacrifices so as to compromise their extreme views. Without compromise, agreement was impossible. The delegations of the respective nations seem to have been dominated by the naval experts, whose main object was, apparently, to avoid any agreement which would result in naval limitation. The conference failed to observe Lord Robert Cecil's formula of successful negotiation that "experts should always be on tap, but never on top."

Regardless of the technical aspects of the question, it may be noted that the United States continued to advocate world-wide disarmament, but, at the same time, it maintained the somewhat anomalous position of declining to participate with Europe in the establishment and maintenance of general guarantees of security, without which the hope of disarmament is not likely to come to full fruition. Our position, however, is at least explainable, if not excusable, on the grounds that the desired assistance on the part of the United States in maintaining such security might, we fear, involve us in a joint enterprise of armed force, either actual or potential, from which we shrink. Security, France holds, should precede disarmament, rather than be produced by it. The United States regards security as a regional matter and does not deem itself to be directly interested in the question of European security.

Armaments are not an end in themselves but a means whereby nations safeguard and promote what they deem to be national interests. The same statement may be made in regard to war. Until peaceful means in which nations have confidence are available for safeguarding and furthering these interests, it is hardly to be expected that nations will give up either armaments or war. On this account, the position of France that security must precede disarma-

ment seems logical. In other words the problem of armaments can be solved only by the indirect method of first providing security. The United States, however, continued to approach the problem mainly by the direct method of technical arms reduction.

#### LATER DISARMAMENT DEVELOPMENTS

Upon the invitation of Great Britain, a conference was held in London in 1930 attended by the principal naval powers. One of the purposes of the conference was to secure an agreement on the limitation of the types of warships other than those which had been limited at the Washington Conference. Some success was achieved in this direction. As to cruisers and destroyers, the United States, Great Britain and Japan were placed on a ratio of 10:10:7, while in the case of submarines, Japan was accorded a position of parity.

The London Conference did not deal merely with ships and guns, but was also concerned with important political questions. The traditional position of France has been that security should precede, rather than follow, disarmament. This thesis she supported vigorously at the London Conference. Before agreeing to limitation of armament, she demanded an agreement of mutual assistance which would increase her security. This might take the form of a clarification of Article XVI of the Covenant of the League of Nations whereby unanimous recommendations of the League Council should be regarded as obligatory. This, however, would not apply to the United States, a non-member of the League. The United States is, however, a signer of the Kellogg pact. At the time of the Russo-Chinese crisis in November, 1929 the United States Government had felt the need of implementing the Kellogg pact at least to the extent of consulting with the other powers. Moreover, in the Four-Power Pacific Treaty, the

United States had agreed to consult with the other signatory powers when the status quo in the Pacific should be threatened. It was therefore suggested that the United States should agree to a consultative pact as a part of the London naval treaty. There was wide difference of opinion in the United States as to whether our Government should enter into such a pact. Our delegation at London finally declined definitely to do so. The reason for this position was indicated in a public statement of Secretary Stimson in which he said that the United States will not "enter into any treaty, whether consultative or otherwise, where there is danger of its obligation being misunderstood as involving a promise to render military assistance or guaranteeing protection by military force to another nation. Such a misunderstanding might arise if the United States entered into such a treaty as a *quid pro quo* for the reduction of the naval forces of another power."

A clause in the London treaty, inserted at the insistence of Great Britain, and variously known as the escalator, escape, or safeguarding clause, permitted any one of the three principal naval powers to override the limitations of the treaty and to increase its naval tonnage if in its opinion, its national security should be affected by new construction of any other power. Its release from the obligations of the treaty may, under these circumstances, be secured by merely notifying the other contracting parties to that effect. The latter are thereupon similarly released from the limitations of the treaty. This clause undoubtedly weakened the effect of the treaty. Although the impression created by the London Naval Treaty in the United States was generally one of disappointment, in that it did not accomplish as much as the American public had been led to believe it would accomplish, it was nevertheless ratified by the Senate subject to the reservation that there should be no secret commitments, modifying the treaty.

## THE WORLD DISARMAMENT CONFERENCE

A World Disarmament Conference, called under the auspices of the League of Nations, met at Geneva in 1932. The League's Preparatory Commission, in which the United States was represented, had drawn up a Draft Convention by which the powers agreed "to limit and so far as possible" reduce armaments in accordance with the methods therein specified.

On account of its vital interest in this subject, the United States Government did all that was feasible in attempting to make this conference a success. The other powers generally favored the indirect method of budgetary limitation, and this method was embodied in the Draft Convention. The United States opposed this method on two grounds: First, because, on account of higher costs in this country, it would not permit the United States to attain parity; and, secondly, because it would violate our Constitution to agree to budgetary limitation, inasmuch as that instrument gives to Congress the discretionary power to appropriate money without limit for the support of the army and navy. With reference to the first objection, it would seem that this difficulty could be overcome through making a compensatory allowance to the United States in order to equalize costs for purposes of comparison. The second objection is without merit, for we have hitherto entered into several treaties of undoubted constitutionality which limit, in the international sense, the discretionary power of Congress under the Constitution. Congress is under a moral obligation to observe such limitation, but is not legally bound in the domestic sense. At all events, our Government weakened in its opposition to the method of budgetary limitation, and was willing to overlook its objection to this method if it would conduce to the success of the Disarmament Conference.

The Draft Convention also made provision for a perma-

nent disarmament commission to collect and disseminate information on the status of armaments and to report annually to the League Council. At first the United States objected to "any attempt to control, direct, investigate, or inquire within the territory of any party," but later withdrew its objection to the section of the Convention providing for the Disarmament Commission.

France maintained, as she had previously done, that security must precede disarmament, whereas the United States had been one of the principal proponents of the doctrine that disarmament is the best guarantee of security. We now, however, indicated our willingness to recognize to some extent the validity of the French thesis. We indicated our willingness to help to contribute to the general security through the adoption of particular measures, including international supervision of armaments, and consultation with other powers when peace is threatened, with a view to averting conflict. We were willing not only to submit to international supervision of our armaments, but also to assist in formulating such supervision and to participate in it.

In spite of these concessions on the part of the United States, the Conference, although holding numerous sessions and maintaining a slender thread of life for several years, resulted in dismal failure. It met under very unfavorable conditions. Among these was the war cloud in the Far East and the apparent ineffectiveness of the League of Nations and other peace machinery in dealing with that situation. This did not tend to increase the general confidence in the capacity of such machinery to maintain peace in the world generally, with the result that nations were more inclined to depend on the strength of their own arms for security than upon international action or agreement for the limitation of armament.

The representatives of the respective powers evinced an unwillingness to reduce their own armaments, a feeling

which was accentuated by events tending to constitute a menace to continued peace. The principal event of this sort was the coming of Hitler to power and the emergence of a new and more militant Germany. The Treaty of Versailles had contained a promise on the part of the allied powers to reduce their armaments, while at the same time it restricted within narrow bounds the armament of Germany. The allied governments showed little indication of a determination to keep their promise and Germany naturally became restless under the treaty restrictions, and demanded the right to rearm. When the allied powers seemed unwilling to grant this right immediately, she virtually wrecked the Disarmament Conference by withdrawing from it. She also at the same time announced her intention to withdraw from the League of Nations.

#### END OF THE PACIFIC RÉGIME

The failure of the World Disarmament Conference was especially regrettable because of the rapidly approaching termination of the Washington and London naval agreements. By its own terms the Washington Treaty of 1922 could be terminated at the end of 1936 upon two years' notice, and this notice was given by Japan in 1934. The London Treaty of 1930 expired automatically at the same time and, by its provisions, a conference was to be held in 1935 in order to negotiate a new treaty to replace it. This conference was held at London, attended by delegates from the United States, Great Britain, Japan, France, and Italy. The principal difficulty confronting the conference in devising a replacement agreement was the demand of Japan for parity or a "common upper limit" in naval tonnage and the refusal of the United States to concede it. Our Government was willing to concede equality of security, but this principle would require that American naval superiority be maintained, because of the



need for defending our much greater coastline facing on two oceans and because of the greater distance of our outlying possessions from our mainland. When it appeared in January, 1936, that this impasse could not be overcome, Japan withdrew from the conference.

In spite of the withdrawal of Japan the other delegates continued to meet and, two months later, succeeded in reaching an agreement, which was signed by the delegates of the United States, Great Britain, and France. This provided for a qualitative limitation rather than a quantitative limitation on naval vessels and guns. It also provided for exchange of information among the signatories regarding their respective naval building programs. This was an important step in helping to allay suspicion and distrust. It was somewhat defective, however, in not providing that such information should be filed in a central international disarmament office. Although this treaty is to extend to 1943, its force is weakened by insertion of escape clauses. In addition to the treaty, an exchange of notes was effected between the United States and Great Britain prohibiting competitive building and providing for parity between them.

The old 5:5:3 ratio is now dead. Beginning in 1937 the United States and Japan are free to engage in a naval race, but the smaller financial resources of Japan render it unlikely that she can achieve actual parity with the United States. It should also be noted that the termination of the Washington Treaty brings to an end also the provision whereby the three principal naval powers agreed to maintain the *status quo* in regard to fortifications and naval bases in the Western Pacific Ocean. What is known as the Pacific régime, a series of limitations based on contract, thus came to an end. Early in 1938, President Roosevelt announced that the United States might soon be compelled by international conditions to enter upon an enlarged naval building program.

## TRAFFIC IN ARMS

A matter closely connected with disarmament is the international traffic in arms. If there were no control over such traffic, the enforcement of treaties for the limitation of armament would be much more difficult. That the United States early recognized the desirability of such control, at least to a limited extent, was shown by our adherence to the Brussels Convention of 1890. Although this treaty was intended mainly for the suppression of the African slave trade, one part of it provided for governmental control over the arms traffic in that region.

On account of the development of its manufacturing facilities, the United States has for a long time been one of the principal arms producing countries. During the period of our neutrality before our entrance into the World War, the United States was one of the main sources of supply for the shipment of arms and munitions to the belligerents. The end of the War left on hand in the warring countries large quantities of munitions, the disposition of which was a difficult problem. The Covenant of the League of Nations declared that "the manufacture by private enterprise of munitions and implements of war is open to grave objections" and authorized the League Council to advise how the evil effects attendant upon such manufacture can be prevented.

In 1919 the Convention of Saint Germain was drawn up, which broadened the arms traffic control of the Brussels Convention so as to extend it to parts of Asia. It prohibited the export of arms and munitions except under governmental license. A slight degree of international supervision was provided for through the establishment of a central office under the League of Nations. This provision rendered it unacceptable to the United States, which refused to ratify it, and this had the effect of killing the treaty.

Another reason why the United States objected to the Saint Germain Convention was because of the provision whereby the contracting parties were prohibited from selling munitions to states that were not parties to the Convention. This provision might interfere with the policy of the United States in selling arms to Latin-American Governments in order to aid them in putting down revolutions. In 1912 Congress had passed a resolution authorizing the President to forbid the export of arms to Latin-American countries (extended in 1922 to China), when conditions of domestic violence exist therein, but subject to such "limitations and exceptions" as the President may prescribe. The latter clause would allow the President to permit shipment to Latin-American Governments which we recognize, while prohibiting it to the revolutionists. This has been done in several instances, as, for example, in the case of Nicaragua in 1926-1927.

Another objection of the United States to the convention of Saint Germain was that it would call for the enactment of legislation to control private arms manufacture, a matter which was constitutionally under the control of the states rather than of Congress. That there was no way under the Constitution whereby the United States Government could control private arms manufacture continued to be the position of our Government until 1932. It was then admitted that, in the enforcement of a treaty, Congress could constitutionally enact legislation for such purpose.<sup>1</sup>

After the failure of the Saint Germain Convention, the League of Nations took up the matter again and called a conference which met at Geneva in 1925, and at which the United States was represented. This conference succeeded in drawing up a convention for the control of the arms traffic through a system of governmental export licenses. On account of the opposition of our delegates, the project

<sup>1</sup> Cf. *Missouri v. Holland*, 252 U. S. 416 (1920).

for the establishment of a central international office under the League of Nations was eliminated. Although the Geneva Convention of 1925 was finally approved by the Senate, this belated action did not come until nearly ten years later.

The favorable action of the Senate was probably due to an aroused public opinion in regard to the question. This was due in part to the revelations of the Senate Munitions Investigating Committee, known as the Nye Committee. Testimony produced before the Committee showed that American and foreign armaments firms were linked together in an international enterprise to promote the sale of munitions by lobbying, bribery and other devious methods. They actively opposed the movement for the limitation of armaments and attempted to defeat national laws and international agreements which might have the effect of reducing their enormous profits. More specifically, these investigations showed that (1) armament firms sell arms simultaneously and indiscriminately to both sides in time of war, including revolutionary and governmental factions in civil war; (2) they maintain lobbies to support military and naval appropriations and to oppose arms embargoes; (3) that by mislabeling shipments, they send arms to warring nations in violation of embargoes; and (4) that American, British, and German armament firms exchange information among themselves regarding secret processes and join together for the purpose of stimulating armament races between friendly nations.

In November, 1934, shortly after these revelations were published, the United States delegation to the Disarmament Conference at Geneva submitted a draft treaty providing for the control of both the manufacture of, and traffic in, arms. It also provided for the establishment at Geneva of a central information and publicity office. Although the United States Government has not approved any plan for total abolition of private manufacture and traffic in arms,

the provisions of the draft convention of 1934 showed that it was willing to take a very advanced position in the direction of international supervision and regulation of the industry.

In order, through national legislation, to assist in reducing the evils of the arms traffic as revealed by the Nye Committee, Congress in August, 1935, passed a joint resolution, in the preparation of which the State Department collaborated. One section of this resolution provided for the creation of a National Munitions Control Board, composed of the Secretaries of State, Treasury, War, Navy, and Commerce. All manufacturers, importers and exporters of arms and munitions were required to register with the Secretary of State. Foreign trade in such materials could be carried on only under licenses granted by the Federal Government.

The control over the arms traffic provided in the resolution was incidental to the maintenance of American neutrality, with which the resolution was principally concerned.

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## CHAPTER XI

### THE POLICY OF NEUTRALITY <sup>1</sup>

**A**LTHOUGH it may be the part of wisdom for the United States, through coöperation and consultation, with other powers, to attempt to prevent wars from breaking out, it is nevertheless true that war may come in spite of these efforts. The question then arises as to what the policy of the United States shall be. Under these circumstances we have usually pursued the policy of neutrality.

In the popular sense, neutrality means simply taking no sides in a war between other states. International law, however, at least as developed up to the outbreak of the World War, undertook to go further and to lay down rules defining the rights and duties of neutrals. These rules had to do principally with trade between neutrals and belligerents. This is important because, when war breaks out, each belligerent attempts to obtain from neutrals supplies which it does not produce itself or supplies which it needs in larger quantities than it produces itself. These supplies are, first, arms and implements of war; second, other materials useful in peace as well as in war; and third, loans or credits with which to purchase such supplies. Each belligerent also attempts as far as possible to prevent neutrals from sending such supplies to the enemy. Articles of trade were divided into three classes: absolute contraband, such as arms and munitions; conditional contraband, such as articles useful either for warlike or peaceful purposes; and non-contraband, or articles useful only for peaceful purposes. Absolute contraband was subject to

<sup>1</sup> See also below, Chap. XXVIII.

capture and confiscation by belligerents. Conditional contraband might be similarly treated if destined for military use. Non-contraband articles were such as were destined for use by non-combatants and were not subject to capture. The rules of international law allowed neutrals, that is, the citizens but not the governments of neutral countries, to sell goods of any kind to both belligerents. These rules represented a working compromise between the interests of belligerents and those of non-belligerents.

#### OUR HISTORIC POLICY

After the French Revolution, war broke out between England and France, and the question then arose whether the United States was bound, under the treaty of 1778, to go to the assistance of France. On this point President Washington asked for the opinions of the two leading members of his Cabinet, Hamilton and Jefferson. Differing fundamentally in their points of view, it is not surprising that these two men should have taken opposite sides upon this question. Hamilton, a believer in strong government, was pro-British in his sympathies while Jefferson, an extreme democrat, was pro-French. It was natural, therefore, that Hamilton should have advocated neutrality in the war between England and France, while Jefferson was in favor of giving active assistance to France. Technically, the decision seemed to turn upon the question as to whether the treaty of 1778 was still in force. Hamilton argued that since the treaty had been made with the old monarchy which had now been overthrown, it was no longer in force. Jefferson, however, took the position, now well established in international law, that treaties are made with the state or nation, rather than with the government, and, consequently, a change of government does not terminate the treaty nor interrupt its continuing force and validity. President Washington agreed with Hamilton

that neutrality was the best policy, but, due to the cogency of Jefferson's reasoning, had to admit that the treaty was still in force. However, he skilfully avoided this dilemma by interpreting the treaty as requiring our assistance only in case France was engaged in a defensive war. Since he considered that France was then engaged in an offensive war, our obligation under the treaty did not arise, and hence he was free to issue a proclamation of neutrality.

On April 22, 1793, the proclamation was accordingly issued. Although couched in succinct and matter-of-fact language, it still stands as one of the most important state papers in our history and as a landmark in the development of the concept of neutrality in international law and relations.<sup>1</sup> During the Revolutionary and Napoleonic wars, which lasted almost continuously from 1793 to 1815, the United States was one of the principal neutral powers in the world, but, unfortunately, we did not maintain our neutrality continuously to the end, as is evidenced by our partial war with France in 1798 and the War of 1812 with Great Britain.

During the century following the War of 1812, the United States was able to avoid being drawn into wars originating between other nations. Thus, in the case of some important wars, such as the Franco-Prussian War of 1870 and the Russo-Japanese War of 1904, the United States declared, and succeeded in maintaining, its neutrality.

The greatest test of the American policy of neutrality occurred during the period of 1914-1917. At the outbreak of the World War, President Wilson issued his proclamation of neutrality and called upon the American people to be neutral not only in act but also in thought. This was more easily said than done. In the first place, high-powered propaganda was carried on by both sides in the attempt to influence public opinion in the United States, the most important neutral nation. In the second place,

<sup>1</sup>Text in Appendix I.



the American people, composed of the descendants of European emigrants, were imbued with innate sympathies which predisposed them toward siding with one or the other group of belligerents. Thus both the soil and the seed were prepared for a departure from neutrality. This situation rendered its maintenance more and more difficult.

Both sets of belligerents in the World War violated the rights of neutrals which, it had been supposed, were guaranteed by international law. Great Britain extended the list of contraband articles so as to include many articles such as food, which had hitherto been generally regarded as non-contraband. She established a blockade of German ports so as to shut off American trade with the Central Powers. She even seized American goods bound for neutral countries on the ground that they were destined ultimately for Germany. Our Government, of course, made diplomatic protests against these violations of our neutral rights, but to little avail.

The Central Powers protested against the sale by American firms of arms and munitions to the Allies, on the ground that such sale to that group of belligerents only which controlled the high seas was an unneutral act. Our Government, however, continued to maintain the neutral right of our citizens to engage in such trade, even though the Central Powers were unable to obtain similar deliveries, because first, the existing rules of international law recognized its validity and, second, otherwise small and non-manufacturing nations would either have to lay in supplies during time of peace or themselves become manufacturers of arms and munitions.

Germany also retaliated against Great Britain by conducting a submarine campaign whereby numerous merchant ships carrying passengers and freight were sunk with loss of life. The most striking incident of this sort was the sinking in 1915 of the British liner *Lusitania*, with the loss of the lives of 128 American citizens. This event

shocked the American people and was a very serious threat to the maintenance of our policy of neutrality. The Wilson Administration protested vehemently against the submarine campaign which resulted in the sinking of this and other ships with the loss of American lives.

Some of the more pacifistically inclined members of the Administration, such as Secretary of State Bryan, were in favor of warning American citizens against travelling on armed merchant ships of the belligerents, but the Mc-Lemore Resolution, introduced in Congress and requesting the President to issue such a warning, was tabled. Those who favored this resolution were of the opinion that, if American citizens continued to travel on such ships, the result would almost inevitably be to drag the United States into the war. President Wilson, however, while hoping to avoid war, was determined to insist on the right of American citizens to travel on the high seas, even though this policy should lead to war.

In spite of the exchange of many diplomatic notes, Germany could not be persuaded to refrain from the use of the submarine and, on February 1, 1917, resumed unrestricted submarine warfare. The reply of President Wilson was to sever diplomatic relations with Germany. This action preceded by only two months the declaration of war against Germany.

Although the United States undoubtedly had good grounds of complaint against Great Britain, she went to war rather against Germany because, fundamentally, the right to life is more sacred than that to property. There were also other causes which influenced our action. The war fever in the United States was heightened on account of German plots to blow up our munition plants and to induce Mexico to go to war against us. Since the Central Powers were under the rule of almost absolute monarchs, there was some basis for the feeling that in going to war against them, we were waging the fight of democracy

against irresponsible dictatorship. Finally, it should be remembered that we had loaned large sums of money to Great Britain and her allies in order to enable them to finance their purchases of supplies in the United States, and we thus had an enormous economic stake in the success of the allied cause. As to how much weight should be accorded to these various causes or influences, there is room for difference of opinion. At any rate, the question as to the causes of American entrance into the war is not merely one of historical interest, but is one of practical importance in its bearing upon present and future policy.

#### POST-WAR DEVELOPMENTS

Although the United States went into the war largely because of the violation of our neutral rights, no attempt was made after the war to secure international recognition or definition of such rights. This was no doubt because President Wilson expected that the United States would become a member of the League of Nations, under whose Covenant the concept of neutrality would become virtually outworn and would be replaced by the principle of collective security. No definite repudiation of the principle of neutrality, however, was formally made either by the United States or by the members of the League. On the contrary, provisions of various treaties entered into during the post-war period assumed, either impliedly or expressly, that the law of neutrality continued to exist.

After the making of the Kellogg-Briand Anti-War Pact, it was thought by some, including Secretary of State Stimson, that the Pact had abolished the traditional concept of neutral rights. Moreover, shortly after the adoption of the Pact, a resolution was introduced in Congress providing for an embargo on the shipment of arms or implements of war to any country found by the President to be at war in violation of the Pact. This resolution followed

the precedent of earlier Congressional resolutions providing for an embargo on the export of arms or implements of war to any country found by the President to have violated any treaty, convention, or other peaceful means for the settlement of international controversies by engaging in aggressive warfare against any other country. These resolutions were intended in part to meet the objection that the insistence by the United States upon its neutral rights to engage in the traffic in arms might seriously interfere with the attempt of a group of powers to fulfil their obligations under the Covenant of the League of Nations to take coercive measures, military and economic, against an aggressive nation. In other words, it was feared that a blockade or boycott against such a nation could not be enforced unless the United States renounced its right to traffic in arms. However, none of these Congressional resolutions was passed.

In 1933 our Government made a gesture of coöperation with other nations in favor of peace. Our delegate to the World Disarmament Conference, Mr. Norman H. Davis, declared:

“We are willing to consult other states in case of a threat to peace with a view to averting a conflict. Further than that, in the event that the states, in conference, determine that a state has been guilty of a breach of the peace in violation of its international obligations, and take measures against the violator, then, if we concur in the judgment rendered as to the responsible and guilty party, we will refrain from any action tending to defeat such collective effort which these states may thus take to restore peace.”<sup>1</sup>

This commitment, however, was contingent upon the success of the Disarmament Conference, so that it did not become binding. It was evidently intended to associate the United States with members of the League of Nations in the imposition of economic sanctions against an aggres-

<sup>1</sup> *U. S. Dept. of State Press Release, May 27, 1933, p. 390.*

sive or covenant-breaking nation, so that, if the League should declare an embargo on the shipment of arms to such aggressor, the United States would yield up its neutral rights to the extent of refraining from selling arms to such aggressor.

The position taken in the Norman Davis statement was evidently not approved by some influential members of the United States Senate. An arms embargo resolution introduced in Congress in 1933 at first allowed the President at his discretion to apply the embargo "to such country or countries as he may designate." The Senate, however, adopted an amendment to the resolution according to which any Presidential determination invoking the arms embargo would have to apply to all the parties to the international dispute whom it would affect. The enactment of the resolution with this amendment was intended to prevent the United States from taking action against any particular aggressor nation. In some cases, it might be difficult to determine which is the aggressor nation. On the other hand, it should be noted that to declare an embargo against both parties to a dispute would actually favor the party that was best prepared before the conflict.

The attitude of the Senate as evidenced by this amendment is one that is held by a considerable section of public opinion in the United States. Those who hold this view believe that if the United States should take sides in a European conflict by joining with a group of powers in designating a particular nation as an aggressor, it will almost certainly involve us needlessly in war. They believe that the advent of Hitler and the resurgence of narrow nationalism in Europe are very likely to bring in their train a new World War which the United States should stay out of if at all possible. The probabilities are that we will not be able to keep out of it, but at any rate we should not give up our right to remain neutral except in return for adequate compensating advantage.

The policy of the Roosevelt administration, as represented by Mr. Norman H. Davis, seemed to be that we could afford to make a concession with reference to our neutral rights if the principal powers of Europe would agree to a reduction of armaments to a defensive basis or domestic police force. If such agreement could be reached the possibility of offensive war would be eliminated and our abandonment of the right of neutrality would not matter. The growing menace of Hitlerism, however, renders it impracticable to reach such an agreement and this was especially evident after the withdrawal of Germany from the Disarmament Conference and also practically from the League of Nations. This development weakens the argument in favor of the abandonment of our neutrality.

The embargo resolution of 1933 failed to pass Congress, but when, in 1934, a report of the League of Nations called attention to the fact that the sale of arms and munitions to Bolivia and Paraguay was tending to encourage and prolong the war raging between those countries, Congress passed and the President approved a resolution authorizing him, after consultation with and in coöperation with other governments, to prohibit the sale within the United States of arms to those countries. In spite of the fact that the League had found Paraguay to be the aggressor, the resolution applied impartially to both belligerents.<sup>1</sup>

#### THE NEW NEUTRALITY

During the period from 1914 to 1935 several changes took place in fundamental conditions which modified the problem regarding the maintenance of American neutrality. The first of these changes was the establishment of the League of Nations, one of the purposes of which is to

<sup>1</sup> This resolution was upheld as constitutional by the Supreme Court of the United States in *U. S. v. Curtiss-Wright Export Corporation*, decided Dec. 21, 1936 (57 Sup. Ct. 216).

enable the large group of peace-loving nations to maintain a united front against an aggressor nation through a system of collective responsibility. The second development is the advance of science, whereby a great many more articles are now useful for war than was formerly the case. Moreover, the distinction between combatants and non-combatants has become dim. The result is that practically anything is likely to be regarded as contraband in future wars. The growing interdependence of nations brings it about that a war anywhere is likely to have important repercussions all over the world. This situation renders considerably more difficult the position of those nations that desire to remain neutral. If anything is contraband, the trading rights of neutrals in another World War would be so precarious that the traditional principle of the freedom of the seas would be practically nullified.

In the third place, it should be noted that the amount of American foreign trade had fallen off in recent years as compared with the war and early post-war period. This reduced stake in foreign trade makes it a somewhat less serious threat to our economic structure to consider curtailing still further such trade during time of war.

Finally, the apparently disappointing results obtained from various movements for the preservation of peace, such as the Kellogg Pact and the World Disarmament Conference, together with a widespread opposition to coöperation with the League of Nations, led many people in the United States, especially among the pacifist groups, to turn to the idea of neutrality as a device for avoiding war. This device was viewed, not in the traditional sense as a set of rules defining the rights and duties of neutrals during time of war, but rather as a means whereby the United States could avoid being dragged into "other peoples' wars."

Definite action along these lines was finally brought about as the immediate result of two developments. The

first was the disclosures made by the Senate Munitions Committee, known as the Nye Committee, which left a widespread impression that the sale of arms and munitions by American firms to the Allies during the World War was one of the principal causes of American entrance into that conflict. Whether this was true or not, the fact that it was widely believed gave popular support to the movement for prohibiting such sale in any future war.

The second development was that, as the result of threatened hostilities between Italy and Ethiopia in 1935, another European war seemed imminent. Moreover, for some time past there had been a progressive deterioration of the international situation, which had led many Americans of various shades of opinion to feel that the United States should abandon the policy of drift and should, through national legislation, adopt a carefully constructed plan to prevent the dragging of America into future wars.

#### THE NEUTRALITY RESOLUTION

This national legislation took the form of a joint resolution passed by Congress and signed by President Roosevelt in August, 1935. This temporary resolution was extended, amended, and enlarged by another joint resolution passed in February, 1936, and again by a joint resolution passed in May, 1937. These successive amendments and additions indicate the tentative and experimental nature of the legislation. Some of the more important provisions of the resolution as amended and enlarged in 1937 are as follows.

The President is required, whenever he "shall find that there exists a state of war" between two or more foreign states, to proclaim such fact. After the issuance of such proclamation, it is made unlawful to export "arms, ammunition, or implements of war" from the United States to any such belligerent or to any neutral state for transshipment to any such belligerent. If other foreign states later



become involved in the war, the President is required to extend such embargo to them also. Furthermore, the President is also required to proclaim an embargo on such exports to a foreign state in which he finds a condition of "civil strife" to exist if, in his opinion, the export of arms to such state would endanger the peace of the United States.

The act shall not apply to an American republic engaged in war against a non-American state, provided the American republic is not coöperating with a non-American state or states in such war.

The President is required by proclamation definitely to enumerate the "arms, ammunition, and implements of war" whose export is forbidden, but these terms are to be understood in the strict sense, so as not to include raw materials. However, if the President, after having proclaimed an embargo on arms, ammunition, and implements of war, shall find that the placing of restrictions on the export of other articles to belligerent states is necessary to protect the security or peace of the United States or the lives of its citizens, he shall so proclaim, and from time to time definitely enumerate such articles, and it shall then be unlawful for American vessels to carry such articles to belligerent states or to a state wherein civil strife exists. American vessels are also prohibited from carrying arms, ammunition, or implements of war to such states named in the President's proclamation.

After the President has proclaimed restrictions on the export of certain articles from the United States to belligerent states, or to a state wherein civil strife exists, it shall be unlawful to export or transport to such states any articles or materials whatever until all title or interest in them shall have been transferred from the American seller to the foreign purchaser.

After the President has proclaimed a state of war, it shall be unlawful for any person in the United States to

traffic in the securities of the government of any belligerent state or state wherein civil strife exists, issued after the date of the proclamation, or to make loans or extend credit to any such government, except ordinary commercial credits and customary short-time obligations. Funds, however, may be collected by private organizations to relieve human suffering in belligerent states or states wherein civil strife exists, subject to such regulations as the President may prescribe.

The act further provides that whenever the President shall have issued his proclamation declaring the existence of a state of war or civil strife, it shall be unlawful for any citizen of the United States to travel on any vessel of any state named in such proclamation, except in accordance with such regulations as the President may prescribe.

Finally, the act makes it unlawful for American vessels engaged in commerce with any belligerent state, or state in which civil strife exists, to be armed or to carry any armament, except such as may be necessary to preserve discipline aboard such vessels.

Shortly after the passage of the original resolution in 1935, the President had occasion to act under it. A few days after the invasion of Ethiopia by Italy the President issued a proclamation on October 5, 1935, declaring that a state of war existed between those nations and definitely enumerating the arms, ammunition, and implements of war which could not be legally exported to either belligerent. With the exception of aircraft, these consisted of articles useful only for warlike purposes. On the same date, the President issued another proclamation admonishing all citizens of the United States to abstain from travelling on any vessel of either of the belligerent nations. The President also declared on his own authority that "any of our people who voluntarily engage in transactions of any character with either of the belligerents do so at their own risk." In other words, if they should be threatened with

loss in connection with such transactions, they could not look to our Government for protection.

#### EVALUATION OF THE NEUTRALITY LEGISLATION

The neutrality legislation of 1935-1937 does not form a complete code of neutrality and some of its provisions cannot properly be classified as pertaining to neutrality. Nor is it based on thoroughly consistent principles. It was the result of compromise between various groups with divergent views.

The fundamental purpose of the legislation is not to preserve American neutral rights, but to prevent the United States from being dragged into the wars of other countries. The legislation is revolutionary in that it abandons to a large extent the traditional American policy of the "freedom of the seas." In attempting to accomplish its purpose, it renounces various neutral rights upon the maintenance of which our Government insisted during the period of our neutrality from 1914 to 1917. Among these were the right to sell arms to belligerents and to travel on belligerent merchant ships. Belligerent interference with the exercise of such rights was one of the reasons for American entrance into the World War. The neutrality legislation of 1935-1937 is based on the feeling that, in the case of future wars, it is better to renounce such rights than to run the risk of being again dragged into war.

There is some doubt as to whether this view is sound. It may be that the United States would have entered the World War eventually even if we had not insisted on the maintenance of our neutral rights. There were various other factors, such as the invasion of Belgium and stories of German atrocities, which exerted a powerful emotional influence upon the popular mind in the United States and might eventually have led us into war. Assuming a similar situation in a future war, the effect of the recent neutrality

legislation might be that we would lose whatever advantage might accrue from the exercise of our neutral rights without obtaining the counterbalancing advantage of keeping out of the war.

One of the compromises of the neutrality legislation is as to the extent of the discretion to be allowed the President in applying and administering it. In the nature of the case, he could not be deprived of all discretion. Thus, he has discretion to decide when a "state of war" exists abroad. When hostilities broke out between Italy and Ethiopia in 1935, the President promptly declared a state of war to exist, but when a similar situation arose between Japan and China in 1937, the President did not immediately issue such a declaration. The principal respect in which the legislation is mandatory is that, when the President proclaims an embargo on the shipment of arms, the prohibition must apply equally to both or all belligerents, even those that later become involved in the war. In other words, the President is allowed no discretion in determining which belligerent is the aggressor and applying the embargo to that one alone. Against allowing the President this discretion, it may be argued that, in the case of some wars, this would be a difficult and embarrassing decision for the President to make and that, furthermore, any belligerent designated by the President as an aggressor might resent our attitude to such an extent as to resort to acts of retaliation which might involve us in war.

The question of allowing the President discretion to designate the aggressor is, however, bound up with the relation of the United States to the League of Nations. Even if the President were granted such discretion, he would probably not exercise it except in harmony with a group of other nations, such as the members of the League. It was probably this very circumstance which reinforced the view of isolationist members of Congress that the President should not be given such discretion. They pre-

ferred that the United States, through national legislation, should follow its separate course rather than coöperate with other peace-loving nations in presenting a united front to an aggressor. The only exception they were willing to make to the principle of treating all belligerents alike was in the case of an American republic engaged in a war against a non-American state. This was apparently on the assumption that, in such a war, the non-American nation would necessarily be the aggressor and, under these circumstances, the Monroe Doctrine might make it incumbent upon us to allow the shipment of arms to the American republic alone. But the isolationists succeeded in having inserted in the act a proviso which would prevent such shipment to American republics that were coöperating with the League of Nations in warring against a non-American nation designated by the League as an aggressor. The neutrality legislation may also interfere with the effectiveness of League sanctions through the provision requiring the President to extend the embargo to other nations becoming involved in the war.

It would seem that the United States, although not a member of the League, is under some obligation, as an important and powerful member of the family of nations, to assume its share of the general responsibility for maintaining peace and restraining aggression, provided this does not require the exercise by us of armed force outside our immediate neighborhood. The assumption of such a responsibility would be in accordance with our enlightened self-interest, because, after all, the only way whereby the United States can be sure of avoiding war is to prevent any war from breaking out. Moreover, the United States is a party to the Kellogg Pact and to the Argentine Anti-War Treaty of 1933, by the latter of which the parties agree to adopt a "common and solidary attitude" toward aggressors. Such an attitude, however, is hardly feasible between the United States, as long as it insists on following

its separate course, and those Latin-American republics that are members of the League of Nations.

The difficulties that confront the League in dealing with an aggressor, in view of the non-coöperation of the United States and other powerful nations, was illustrated by the Italian-Ethiopian conflict. The League declared Italy to be the aggressor and undertook to apply economic sanctions to her. The United States placed an embargo on the shipment of arms, ammunition, and implements of war to both belligerents, but this embargo did not include oil, which was one of the articles most essential to Italy in the conduct of the war. The League sanctions also did not include oil, because, if they had, the result would merely have been that Italy would have purchased her oil from the United States and other non-coöperating nations. Consequently, the imposition of League sanctions had little or no effect upon Italy.

The shipment to belligerents of oil, cotton, copper, scrap iron, and other materials useful in war, is just as likely to cause the United States to become involved in war as the shipment of arms and munitions. In fact, even food-stuffs intended for the civilian population may be declared contraband. It was for this reason that one of the 1937 amendments to the neutrality legislation authorized the President, in his discretion, to extend the embargo to materials other than arms, ammunition, and implements of war, so as to prohibit their transportation in American vessels. If, however, the President should attempt to embargo practically all important articles of our foreign commerce, the resulting economic depression in the United States would be of such tremendous proportions that, by popular demand, the President would probably be forced to reverse his policy.

In order to overcome the difficulties of such a sweeping embargo policy, the neutrality legislation contains a section, known as the "cash and carry" provision, whereby

the President in his discretion may, during a foreign war, prohibit the exportation in American vessels of any articles or materials whatever until all title or interest in them has been transferred to the foreign purchaser. In other words, belligerents may go into the American market for any legally exportable articles, provided they acquire title to them before they are exported from the United States and carry them away in non-American vessels.

Although the cash and carry scheme might be of some value in enabling American foreign trade to continue without serious risk of thereby involving us in war, it is open to several objections. In the first place, it might be a crippling blow to the American merchant marine, which would find most of its foreign cargoes transferred to vessels of other nations. In the second place, this provision, combined with the provision prohibiting loans to belligerents, would work to the disadvantage of weak and impecunious powers and play into the hands of such belligerents as control the sea and have an adequate gold supply for foreign purchases. This inequality in the operation of the provision might work in favor of the belligerent which has the sympathy of the mass of our people, or it might not. For example, in the case of a Sino-Japanese war, it would operate in favor of Japan.

On the whole, a better plan than the cash and carry scheme would seem to be to allow freedom of Americans to export and transport to belligerents any legally exportable articles, provided such trade is carried on at the trader's risk. This is known as the principle of *caveat mercator*, and was embodied in the warning issued on his own authority by the President in 1935 at the time of the Italian-Ethiopian conflict.

From what has been said, it clearly appears that the neutrality legislation of 1935-1937 cannot be regarded as a definitive solution of the problem of keeping America out of war. As President Roosevelt stated when he signed the

neutrality Resolution of 1935, the inflexible provisions of that act "might drag us into war instead of keeping us out." He further declared that "it is the policy of the Government by every peaceful means and without entanglement to coöperate with other similarly minded governments to promote peace." Probably it is too much to expect that the United States can be insulated from war by any piece of national legislation when we are not insulated in fact from the life of the world. The road to peace, as President Roosevelt intimated, lies rather in the direction of international consultation and coöperation.

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**PART II**  
**CONDUCT**



## CHAPTER XII

### THE BASIS AND MODES OF CONTROL

A NATION'S foreign relations may be considered from two main points of view, according as one is interested in (1) the determination, development, and content of policies, or in (2) the agencies by which policies are carried into effect and the modes by which international intercourse is controlled and conducted. From the first point of view, the chief matters of concern are the interplay of forces which gives form to foreign policies, together with the nature, persistence, and readaptations of these policies. From the second point of view, interest centers in the machinery employed in the carrying on of foreign relations, in the methods pursued, and especially in the relative degrees of control exercised by the several organs of government over the different processes involved. Whether the United States shall be at war or at peace; whether it shall make a treaty with Russia or Siam; whether it shall maintain a protectorate in Santo Domingo or Nicaragua; whether it shall cancel foreign debts; whether it shall recognize a revolutionary government in Mexico, or use its influence to maintain the territorial integrity of China; whether it shall become a member of a general association of nations—these are questions of policy. Public opinion may demand war, or recognition, or a firm stand in the Far East, or membership in an association. But not until the appropriate governmental authorities take the necessary action can this opinion be carried into effect. Who shall interpret, who shall lead, public opinion in determining the policies to be pursued, and who shall execute the policies thus arrived at—these are questions of administra-

tion and control. In some instances, as we shall see, one branch of government determines what the policy shall be, while another executes it. But as a rule the same authorities determine the policy and also execute it.

In this part we are concerned primarily with matters pertaining to the conduct and control of foreign relations, and only incidentally with the content of foreign policies.

On account of the largely separate and independent position assigned to the different organs and departments of government, the conduct of foreign relations in the United States is unusually complicated. In other countries, as a rule, this function belongs almost entirely to the executive. The adoption of such a plan here, however, was considered dangerous by a majority of the members of the Constitutional Convention of 1787, as it seemed to savor too much of monarchy. In the absence of any distinct executive department, foreign relations prior to 1789 were managed by the Continental Congress and the Congress of the Confederation; and this created a precedent for the handling of such matters by the legislative department. Experience under the Articles, however, showed that simple Congressional control of foreign relations was undesirable. Accordingly, the framers of the Constitution provided for a division of this control between the President, the Senate, and Congress. The courts, in construing the laws, might also incidentally affect foreign relations.

#### PRESIDENTIAL INITIATIVE

The power of taking the initiative in the formulation and announcement of foreign policies is not expressly conferred by the Constitution upon any particular organ of the Government. That this power is largely in the hands of the President is, however, inferable from the constitutional provisions expressly vesting in him the power to nominate and to receive diplomatic representatives, to participate in

the making of treaties, and to give Congress information upon the state of the Union. Not only the language of the Constitution, but also the practice of more than a century, establishes the principle that this power rests mainly in the President. Generally, although not invariably, the power of initiative and the power of control go together. The President, then, is in primary control of our foreign relations, and he exercises full authority throughout this entire field, except in so far as the Constitution expressly admits other agencies to a share in this authority, as is seen in the participation of the Senate in the making of treaties and the appointment of diplomatic representatives and of Congress in a declaration of war.<sup>1</sup>

The power of taking the initiative in formulating foreign policies is one which the President has frequently exercised. Washington's farewell advice to his fellow-citizens "to steer clear of permanent alliance with any portion of the foreign world," and the practical application of his policy of aloofness from "controversies, the causes of which are essentially foreign to our concerns" in the issuance of his neutrality proclamation of 1793 have had a potent influence throughout our history. The best-known example, however, of Presidential formulation of foreign policy is the Doctrine of Monroe, which was promulgated in his annual message to Congress in 1823.<sup>2</sup> The principle laid down by Monroe has been elaborated and expanded to meet new conditions in the official utterances of later Presidents, including Polk, Grant, Hayes, Harrison, Cleveland and Roosevelt. In the words and actions of the last two Presidents mentioned, the Monroe Doctrine assumed a more positive and

<sup>1</sup> Cf. the argument of Hamilton in 1793 regarding the power of the President to issue a proclamation of neutrality. *Works* (Lodge ed.), IV, 135 ff. See also Butler, *Treaty-Making Power*, II, 357-60.

<sup>2</sup> It is frequently stated that the person most concerned in the authorship of the doctrine was Monroe's Secretary of State, John Quincy Adams. Even if true, however, this would not affect the fact that the Secretary was acting as the agent of the President, and that the latter assumed the official responsibility of enunciating the doctrine and transmitting it to Congress.

aggressive tone and, in the twentieth century, it came to be known as the policy of the "Big Stick" or the exercise of international police power.<sup>1</sup> Finally, President Wilson, in an address to the Senate on the terms of a possible cessation of the Great War, proposed that "the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world."<sup>2</sup>

The Monroe Doctrine, which is probably one of the three most important political ideas that have played a part in the development of the nation, was thus the exclusive product of executive initiative in foreign policy and did not receive official recognition by Congress until seventy-three years after its original promulgation by the President. It is true, however, that the Presidents have deemed it desirable to secure the support, and at least the tacit approval, of Congress for policies enunciated, and for this reason they have usually announced their views and policies on foreign affairs in addresses or messages to that body.

The President's power of formulating policies would not be of such great importance if he did not also have considerable control over the execution of the policies formulated. Through his power of shaping and enunciating foreign policies, he may virtually commit the nation to such policies, at least in a moral sense.<sup>3</sup> To him is also entrusted, in large measure, the execution of these policies through the exercise of his diplomatic, military and general executive powers; although it is desirable that Congress should be consulted, because, in the execution of such policies the coöperation of that body may sometimes be essential. Some of the policies announced by the President may contain the seeds of war, and if hostilities break out, the action of Congress is necessary for the declaration of war

<sup>1</sup> See Roosevelt's fourth annual message, December 6, 1904.

<sup>2</sup> Address to the Senate, January 22, 1917.

<sup>3</sup> Cf. Taft, *Our Chief Magistrate and His Powers*, 113-4; Wilson, *Constitutional Government in the U. S.*, 77-8.

and for its prosecution, although, as will be pointed out,<sup>1</sup> the President very largely controls the determination of the question as to whether there shall be peace or war, and may manipulate the situation, through the exercise of his diplomatic and military powers, so as practically to compel Congress to declare war.<sup>2</sup> Some of the policies enunciated by the President may, furthermore, require for their fruition the making of international agreements to which the consent of the Senate is necessary, and this, as will be shown, is a more vital check upon the President's control of foreign policy than is the power of Congress to declare war.<sup>3</sup> In the address of President Wilson to the Senate, cited above, he stated that he addressed that body "as the council associated with me in the final determination of our international obligations." It is true, however, that the President's object in this address seems to have been rather to inform the Senate as to policies decided upon than to consult with that body as to what policies should be adopted.

Not only does the President frequently recognize the desirability of Congressional and Senatorial support in order to bring his general foreign policies to fruition, but he at the same time recognizes the necessity for the support of public opinion. Hence, an address to Congress is usually also an address to the people. Indeed, by winning popular support for his views on questions of foreign policy, the President may sometimes bring about desired action on the part of even an unwilling Congress. President Roosevelt achieved some notable triumphs in this way. President Wilson also met with considerable success, at least during his first administration, in marshalling public opinion so as to assure the Congressional coöperation which he deemed

<sup>1</sup> See Chap. XXVIII.

<sup>2</sup> On the other hand, however, it is true that the President has sometimes been practically forced into war, as in 1812 and 1898, through the bellicose attitude of Congress.

<sup>3</sup> President Roosevelt, however, in the Santo Domingo affair of 1905 was able to carry out his policy through an executive agreement without the consent of the Senate.

necessary in carrying out his foreign policies. Notable examples of this were the compliance by Congress with his requests for the repeal of the act exempting American coast-wise vessels from the payment of tolls in passing through the Panama Canal and the tabling of the McLemore resolution requesting the President to warn American citizens against traveling on armed belligerent ships.

Indirect communication by the President of his foreign policy, such as we have been discussing, though usually general in character, may sometimes be directed towards some particular foreign government. In his annual message to Congress, the President, in pursuance of his constitutional duty to give that body information of the state of the Union, frequently dwells at length upon the state of our relations with various foreign countries, and sometimes announces the policy which he intends to pursue towards some particular country. Thus in his first annual address to Congress, in December, 1913, President Wilson declared, with reference to Mexico, that "we shall not, I believe, be obliged to alter our policy of watchful waiting." The President may also sometimes announce a policy directly to a particular country and at the same time inform Congress of his decision. Thus, as the result of the *Sussex* affair in 1916, President Wilson notified Germany directly that, unless she should immediately declare and effect an abandonment of her methods of submarine warfare, our Government would be constrained to sever diplomatic relations with Germany, and on the following day, in an address at a joint session of Congress, he informed that body of his decision.

The President is sometimes constrained to use the indirect method of announcing his policy towards a particular foreign country, not only from a desire to transmit to Congress information in regard to the matter, but also because direct communication with the country in question has been



cut off through the severance of diplomatic relations.<sup>1</sup> Thus, in an address at a joint session of Congress, January 8, 1918, President Wilson outlined the program upon which he would consider peace with Germany, as embodied in the famous "fourteen points," and, in the following October, Germany formally accepted these points as a basis for peace negotiations. Here, as in the case of the President's address to the Senate, cited above, his object appears to have been to inform Congress, as well as Germany, of the program decided upon, rather than to consult Congress as to the terms to be adopted. That the President alone could not, however, finally commit our Government to the terms of his peace program, in so far as they were embodied in the Treaty of Versailles, was shown by the Senate's rejection of that treaty.

Even though diplomatic relations are not severed, there may be a decided advantage in favor of the method of indirect communication through a message or address to Congress. Indeed, information as to the policy of our Government may generally be communicated in this way with little loss of effectiveness and without incurring the possible embarrassments of a diplomatic note. Thus, in his annual message of December, 1834, President Jackson declared that if France continued to delay the execution of the convention of 1831, the United States ought to take redress into its own hands. The President subsequently declined to give the French Government any explanations of his message, partly on the ground that "the right of a foreign government to ask explanations of or to interfere in any manner in the communications of one branch of the Government of the United States with another could not be admitted."<sup>2</sup>

The President sometimes enunciates his foreign policies

<sup>1</sup> Indirect communication, of course, may usually still be carried on through third states, which have proffered their good offices for this purpose.

<sup>2</sup> J. B. Moore, *Digest of Internat. Law*, VII, 125. This point has been further brought out in other instances. *Ibid.*, IV, sect. 671.

in addresses to bodies other than Congress. Thus, President Wilson, in an address to the Southern Commercial Congress, declared that the United States "will never again seek one additional foot of territory by conquest."<sup>1</sup> Again, his Flag Day address of 1917 to his fellow-citizens was at once an exhortation to the people and an announcement to the enemy and to the powers with which we were associated of our determination to prosecute the war to a successful conclusion.

A phase of our foreign policy which has had a very important influence upon our national development is the acquisition of territory. In this respect, also, the President has generally taken the initiative. This is due in part to the fact that most of the territory acquired since 1789 has been obtained through the exercise of the treaty-making power, in which the President assumes the rôle of negotiator. Thus, in spite of his scruples as to constitutional power, Jefferson led in making the treaty of 1803 with France for the annexation of Louisiana.<sup>2</sup> Again, President McKinley and the commissioners whom he appointed to negotiate the treaty of 1898 with Spain assumed the initiative, as the representatives of the victorious power, in demanding the cession of the entire Philippine archipelago instead of merely the island of Luzon. Furthermore, in one case, territory was acquired by the United States by means of a simple executive agreement, without submission of the question to the Senate. This was done in the case of Horse-shoe Reef in Lake Erie, which was ceded by Great Britain in 1850.<sup>3</sup> In most of the cases in which ter-

<sup>1</sup> Address at Mobile, Ala., Oct. 27, 1913, Sen. doc. 226, 63rd Cong., 1st sess., p. 5.

<sup>2</sup> "The Executive," said Jefferson, "in seizing the fugitive occurrence which so much advances the good of the country, has done an act beyond the Constitution." *Writings*, IV, 500.

<sup>3</sup> Malloy, *Treaties*, etc., I, 663. The conditions attached to the cession were that the United States should erect a lighthouse on the reef, but should not erect fortifications. This was, of course, uninhabited territory.

ritory has been acquired, an appropriation by Congress has been necessary to complete the transaction, and the President has sometimes requested and secured such an appropriation in advance.

The initiative assumed by the President in the acquisition of territory may sometimes arise, not from his rôle as negotiator of treaties, but from his general control of foreign policy. This was shown by the annexation of Texas, to which Presidents Tyler and Polk were committed.<sup>1</sup> In this instance the treaty providing for annexation failed in the Senate and Texas was brought into the Union by joint resolution of Congress. The Hawaiian Islands were also annexed by the same method, although President Cleveland had prevented the annexation from becoming an accomplished fact during his second administration by withdrawing from the Senate a treaty for that purpose which had been submitted by his predecessor. That the President is not always able to carry into execution his policy regarding the annexation of territory is indicated by the failure of President Grant to consummate his cherished design of bringing about, either by treaty or by Congressional resolution, the annexation of Santo Domingo. This failure was probably due as much to political hostility to Grant in the Senate as to opposition to the annexation project *per se*.<sup>2</sup> It is to be noted, however, that both Santo Domingo and Haiti have been transformed into quasi-protectorates of the United States through the positive and aggressive

<sup>1</sup>Reeves, *American Diplomacy under Tyler and Polk*. For President Polk's attitude on a territorial indemnity from Mexico, see Richardson, *Mess. and Pap. of the Presidents*, IV, 537-8.

<sup>2</sup>In this connection mention should also be made of the action of Congress in regard to President Wilson's request for authority to assume a mandate over Armenia. In a communication to Congress, dated May 24, 1920, the President said: "In response to the invitation of the council at San Remo, I urgently advise and request that the Congress grant the Executive power to accept for the United States a mandate over Armenia." Congress, however, respectfully declined to grant the authority requested. Cong. Record, May 24, June 1, 1920, pp. 8138, 8693.

application of the Monroe Doctrine carried out on the initiative of the President during the administrations of Roosevelt and Wilson.<sup>1</sup>

In a number of cases, the Supreme Court has recognized the authority of the President to determine political questions connected with our foreign relations. For example, when the Executive denied the jurisdiction which Argentina had assumed to exercise over the Falkland Islands, the Supreme Court held that this fact must be taken and acted upon by the court in deciding the case before it. "Can there be any doubt," asked the court, "that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department?"<sup>2</sup> In other cases, the court has laid down the rule that the action of the political branches of the Government—Congress, the President, and the treaty-making power—in a matter that belongs to them is conclusive.<sup>3</sup> As ex-President Taft has pointed out, "the decision of Congress or the treaty-making power upon such an issue would be binding upon the courts, but in the absence of the decision of either, the action of the President is conclusive with the courts."<sup>4</sup>

<sup>1</sup> The treaty for the annexation of the Danish West Indies, brought forward in President Johnson's administration, also failed to secure the approval of the Senate largely on account of political hostility to the President, but the islands were subsequently annexed by treaty during President Wilson's administration.

President Roosevelt was probably largely influential in bringing about conditions which enabled the United States to secure possession of the Panama Canal Zone. Indeed, in an address at the University of California, March 23, 1911, he is reported as having said: "I took the Canal Zone."

<sup>2</sup> *Williams v. Suffolk Ins. Co.*, 13 Pet., 420 (1839). Cf. *Charlton v. Kelly*, 229 U. S., 447.

<sup>3</sup> *Foster v. Neilson*, 2 Pet., 307; *Garcia v. Lee*, 12 *ibid.*, 511. Cf. *Jones v. U. S.*, 137 U. S., 212.

<sup>4</sup> *Our Chief Magistrate and His Powers*, 118.

## CONGRESSIONAL INITIATIVE AND INFLUENCE

On several occasions Congress has assumed to speak for the United States on questions of foreign policy, not, of course, as a direct organ of international communication, but rather as the mouthpiece of public opinion in matters concerning the nation, whether domestic or foreign. On account of the necessity which the President may feel of securing the support of Congress for the policy which he has tentatively determined upon, the action of Congress may sometimes be taken at the suggestion of the President. This is always true of a declaration of war, because the Constitution specifically invests that power in Congress. But the same thing may happen in cases in which the immediate action of Congress is not constitutionally necessary to the initiation of the project, however necessary the ultimate support of that body may be for the project's consummation. Thus, at the suggestion of President Madison, made in a confidential message of January 3, 1811, Congress passed a secret joint resolution, declaring that the "United States . . . cannot, without serious inquietude, see any part of the territory adjoining the Southern border of the United States pass into the hands of any foreign power."<sup>1</sup>

Congress, however, or either branch thereof, has sometimes taken the initiative in passing resolutions relating to foreign affairs which have not been suggested by the President. Thus, in 1864 the House of Representatives unanimously passed a joint resolution declaring that

"the Congress of the United States are unwilling by silence to leave the nations of the world under the impression that they are indifferent spectators of the deplorable events now transpiring in the Republic of Mexico; and that they therefore think fit to declare that it does not accord with the policy of the United States to acknowledge any

<sup>1</sup> Approved January 15, 1811, and published in 1818, 3 U. S. Stat. at L., 471-2.

monarchical government, erected on the ruins of any republican government in America, under the auspices of any European power.”<sup>1</sup>

This resolution, which was evidently an attempt on the part of the House to force the hand of the President in regard to his Mexican policy, was not acted upon by the Senate. In a dispatch to our minister to France, Secretary Seward pointed out that it emanated from suggestions offered by members of the House itself, and not from any communication of the Executive department, and declared that the French Government would be seasonably apprised of any change of the policy of our Government toward Mexico. “This,” he further declared, “is a practical and purely executive question, and the decision of it constitutionally belongs not to the House of Representatives nor even to Congress, but to the President of the United States.”<sup>2</sup>

This note having been communicated to the House in response to a request from that body,<sup>3</sup> a report was made by the Committee on Foreign Affairs, expressing regret that the President should have thought proper to inform a foreign government of a “radical and serious conflict of opinion and jurisdiction between the depositories of the legislative and executive power of the United States.”<sup>4</sup> The report also recommended the adoption of a resolution, which, with a slight amendment, was passed by the House a few months later, declaring that

“Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters; and it is the constitutional duty of the

<sup>1</sup> Cong. Globe, April 4, 1864, vol. 34, p. 1408.

<sup>2</sup> Mr. Seward to Mr. Dayton, April 7, 1864, Sen. Ex. doc. 6, 39th Cong., 1st sess., p. 5; Hinds, *Precedents*, II, 1007.

<sup>3</sup> House Ex. doc. 92, 38th Cong., 1st sess.

<sup>4</sup> House report no. 129, 38th Cong., 1st sess., p. 1 (June 27, 1864).

executive department to respect that policy, not less in diplomatic negotiations than in the use of national force when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it; and such proposition, while pending and undetermined, is not a fit topic of diplomatic explanation with any foreign power.”<sup>1</sup>

In the debate on this resolution Mr. Blaine declared that it embodied “a new theory in the administration of our foreign affairs.”<sup>2</sup> Its contention that Congress is invested with an authoritative voice in determining the foreign policy of the United States seems, indeed, scarcely to be borne out by previous and subsequent practice. In spite of the passage of the resolution, President Lincoln kept full control over the policy of our Government towards the French in Mexico, and the wisdom of this course was demonstrated by the result. We must concur in the judgment passed upon this incident by a leading American historian, who says:

“Our democracy and our representatives in Congress probably will never learn that the delicate questions of diplomacy, until they reach the point where constitutionally the Senate and the House must be partakers in the action, ought to be left to the Executive. It will prove generally, as it certainly did in this case, that the President and the Secretary of State can deal with such matters with greater foresight and wisdom.”<sup>3</sup>

<sup>1</sup> The first half of the resolution was carried by a vote of 118 to 8 and the second half by 68 to 58. Cong. Globe, 38th Cong., 2nd sess., Dec. 19, 1864, pp. 66-7; cf. J. M. Callahan, *Evolution of Seward's Mexican Policy*, 49; Hinds, *Precedents*, II, 1009.

<sup>2</sup> The resolution as passed by the House was a simple House resolution and therefore was not submitted to the Senate, but on Feb. 28, 1863, a concurrent resolution was introduced in the Senate by Mr. Sumner, from the Committee on Foreign Relations, declaring that Congress would be obliged to look upon any further attempt at mediation by foreign powers in the Civil War as an unfriendly act. President Lincoln, however, had already promptly rejected the offer of mediation. Sen. misc. doc. 38, 37th Cong., 3rd sess.

<sup>3</sup> Rhodes, *History of the United States*, IV, 471.

The Senate, also, has undertaken, on occasion, to formulate the foreign policy of the United States independently of Presidential suggestion. Thus, in view of the reported attempt of a Japanese corporation to secure control of land on Magdalena Bay in Lower California, the upper house, on August 2, 1912, by a vote of 51 to 4, adopted the following simple resolution:

“That when any harbor or other place in the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes.”<sup>1</sup>

That this was intended as an announcement to foreign powers of our national policy was clearly shown by the statement of Senator Lodge, chairman of the Committee on Foreign Relations, who said: “It seemed to the Committee that it was very wise to make this statement of policy at this time, when it can give offense to no one and makes the position of the United States clear.”<sup>2</sup>

The Senate has also undertaken to enunciate general principles of American foreign policy in the form of reservations attached to its resolutions advising and consenting to the ratification of treaties. Thus, in consenting to the ratification of the conventions adopted at the First and Second Hague Conferences and at the Algeciras Conference in 1906, the Senate did so on condition that such action

<sup>1</sup> Cong. Record, vol. 48, pp. 10045-7. This resolution was passed after information on the subject had been sought and obtained from the President which “went to show that the conduct of other powers in regard to those lands had been entirely correct.” 6 *Am. Jour. Internat. Law*, 938. See also Sen. rept. 996 and Sen. docs. 640 and 694, all of the 62nd Cong., 2nd sess.

<sup>2</sup> Cong. Record, vol. 48, p. 10045. The Magdalena Bay resolution, being a simple Senate resolution, and not a joint resolution, was not submitted to the President for his approval or disapproval.



should not be so construed as to require the United States to depart from its traditional policy against participation in the settlement of European political questions, nor from its traditional attitude toward purely American questions.<sup>1</sup> In order that such reservations may have any legal validity as part of the treaty they must be approved by the President; for if they were unsatisfactory to him he might refuse to proceed with the ratification. Practically, however, he might, under some circumstances, be forced to give formal approval to Senate reservations to which he was really opposed in order to secure the consent of the Senate to the ratification of a treaty of which, in the main, he approved.

Finally, the two houses of Congress, by act or by joint resolution, may undertake to formulate foreign policies, although, in this case, the project, in order to be adopted, must, of course, be approved by the President or repassed over his veto.<sup>2</sup> For example, in 1916 Congress passed an act by which it was "declared to be the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided."<sup>3</sup>

#### CONGRESSIONAL REQUESTS FOR INFORMATION

The control of foreign relations naturally tends to gravitate into the hands of that department of the government which is in the best position to secure, as a basis for action, adequate information regarding the state of those relations.

<sup>1</sup> Malloy, *Treaties*, 2032, 2183, 2247.

<sup>2</sup> When such a policy depends for its execution upon positive action on the part of the President, it could hardly be carried out, if disapproved by him, even though the act or joint resolution embodying it were repassed over his veto.

<sup>3</sup> 39 U. S. Stat. at L., 618. It should be mentioned that Congress exercises a very pervasive influence throughout the administration of foreign relations by means of its power of passing or withholding appropriations. This power is discussed in connection with the various phases of foreign relations upon which it exerts an influence.

In this respect Congress is at a disadvantage as compared with the President, who very largely controls the official channels of information. Through his control over the state department and the diplomatic service, he is in touch with more authentic and widespread sources of information than are available for others. In order to take intelligent action in regard to foreign relations, Congress is therefore frequently dependent upon such information as it may be able to secure from the President. On account of the largely separate and independent position occupied by the legislative and executive departments in our Government, the heads of executive departments having no seats in Congress, facilities do not exist such as are found in European parliamentary governments, whereby the legislature, through direct questions and interpellations, may secure information from the executive. Our Constitution, however, imposes upon the President the duty to give to Congress, from time to time, information on the state of the Union; and the Secretary of State sometimes appears, upon request, and testifies before the Senate Committee on Foreign Relations.

The ordinary means, however, whereby Congress attempts to secure information from the President is the passage of simple Senate or House resolutions requesting him to furnish it. Each branch of Congress is constantly attempting to take a hand in foreign relations by requesting the President or Secretary of State to furnish information regarding them. Compliance with such requests, however, is almost invariably asked only in so far as may be deemed compatible with the public interests.<sup>1</sup> The ques-

<sup>1</sup> On January 4, 1848, however, the House passed a resolution, without the customary reservation, requesting certain information from President Polk, and he declined to transmit it to that body except in so far as he deemed it expedient to allow it to become public. Richardson, *Mess. and Pap. of the Presidents*, IV, 566.

In 1826, it was moved to amend a House resolution calling upon the President for information by striking out the customary condition of compatibility with the public interest. In the course of debate, it was argued that the House

tion whether it is compatible with the public interests to furnish information asked for is one to be decided freely by the President; except in a case of impeachment, an unwilling President cannot be compelled to furnish information.<sup>1</sup> Although the President usually complies with such requests, he sometimes does so only after a prolonged delay; he may fail to make any answer at all, or may expressly decline to comply with the request, on the ground that it is incompatible with the public interests to make the information public, since it relates to a matter about which negotiations with foreign powers are pending.<sup>2</sup> The House and Senate resolutions are generally directed to the President, but sometimes to the Secretary of State. The latter officer, however, acts as the agent of, and in subordination to, the President, and will not furnish the information requested if directed by the President not to do so. In 1909 President Taft issued an executive order directing the heads of departments to furnish information when called upon by a resolution of the Senate or House of Representatives, unless in their judgment it was incompatible with the public interests to do so; and in this case they should refer the matter to the President for his direction.<sup>3</sup>

The President sometimes sends information to Congress with the request that it be considered in confidence and be not made public immediately. Thus, President Adams, in 1798, transmitted, with such a request, certain papers con-

might demand any information it might constitutionally want, and, in case of refusal, take the information by ordinary process of the Sergeant-at-Arms. This extreme view, however, was opposed by others who held that the President was as independent in his sphere as the House in theirs. Daniel Webster was among those who opposed the amendment, and it was lost by a vote of 71 to 98. Hinds, *Precedents*, II, 1019-1021.

<sup>1</sup> This was indicated in the case of President Washington's contest with the House over the Jay Treaty, as noted below (see p. 465).

<sup>2</sup> For example, President Wilson and Secretary Bryan refused on this ground to comply with the requests of the Senate calling for all correspondence with belligerent nations concerning the treatment of shipments of copper to neutral countries and concerning the treatment of certain naval stores as contraband of war, as embodied in its resolutions of Jan. 6 and Jan. 8, 1915. Sen. docs. 798 and 799, 63rd Cong., 3rd sess.

<sup>3</sup> Executive order No. 1062, April 14, 1909.

cerning our relations with France.<sup>1</sup> The President cannot be absolutely assured, however, that his request for secrecy will be observed. Congressional requests for information may have the effect of placing the President in an embarrassing position, because if he answers that it would be incompatible with the public interest to make the information public, his answer may be misconstrued and may give rise to the suspicion that the transactions involved are of such a character that they will not bear the light of day. Accordingly, the President may prefer to make no answer at all. This course may seem to be not very courteous to Congress, but it may not be without justification. Just as interpellations in France may be designed, not so much to secure information, as to bring on a vote of want of confidence in the Government, so requests for information by Congress may be made in order to embarrass the administration in handling foreign relations and may even be disguised attempts on the part of Congress to force the hand of the President and to reduce the degree of control over international affairs which he would otherwise be able to exercise. This is especially likely to happen when there is a lack of good working relations between the President and Congress, due to the fact that the two branches of the Government are controlled by rival political parties or by different factions of the same party.

As a rule, information is requested of the President by House or Senate resolution only upon matters with regard to which those bodies are constitutionally empowered to take action. Thus, in the performance of their constitutional functions in connection with impeachment, the two houses of Congress may doubtless exercise such incidental powers as are necessary in order that the constitutional power may be effectuated. One such incidental power might be that of requiring information, including essential papers and documents, from the President or head of an executive

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, I, 265.

department, regarding his conduct in office. Where the constitutionally authorized action contemplated by Congress, however, does not specifically relate to the conduct of the Executive, as, for example, the passing of an appropriation bill, the situation would be different. President Washington, as we shall see, refused to send to the House of Representatives copies of Jay's instructions and other papers relating to the Jay Treaty, although he intimated that, had it been a case of impeachment, he would have furnished them. Except where the Congressional action contemplated relates specifically to the conduct of the Executive, the President has full discretion to withhold the information requested, if he so desires, even though it relates to a matter upon which Congress is constitutionally empowered to act. The right to refuse exists, *a fortiori*, if the Congressional action contemplated relates to a matter about which Congress is not empowered, by the Constitution, to act.

#### INTERNATIONAL COMMUNICATION

A distinction may be made between the formulation of foreign policies and the direct communication of them to foreign governments. The power of formulation and that of direct communication are commonly, but not necessarily, vested in the same organ of government. Direct communication with foreign governments is usually maintained through the sending and receiving of diplomatic representatives. The conduct of foreign relations, however, includes not only diplomatic intercourse, but also such other means and instrumentalities as may be employed for the purpose of international communication. Foreign policies may be formulated by the appropriate organ of our Government and merely announced to the world without immediate direct communication of them to any particular foreign nation or group of nations. International communication,

therefore, may be indirect, as well as direct. Where foreign policies are formulated and promulgated without being directly communicated to any particular nation, they are usually general in character and are intended for the information of any nation or group of nations to which the terms and conditions stipulated may be applicable.<sup>1</sup> Sometimes, however, the indirect method may be adopted for the communication of a policy intended to apply to a single nation.

That the President is the sole organ of communication with foreign governments has been maintained in the utterances of publicists and officials of the Government since its foundation. In 1793, M. Genet, the French minister, having requested an exequatur for a consul whose commission was addressed to Congress, Secretary of State Jefferson informed him that the President, "being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation."<sup>2</sup> The same idea was expressed in Congress by John Marshall during the debate on the Jonathan Robbins extradition case, in which he said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him."<sup>3</sup> In the papers which he published under the name of "Pacificus" *a propos* of Washington's proclamation of neutrality in 1793, Alexander Hamilton enunciated practically the same principle, although in negative form, as follows: "The legislative department is not the organ of intercourse between

<sup>1</sup> It is of course true that general policies applying to a group of nations may also be directly communicated, as in the case of Secretary Hay's circular note to Russia, Germany, Great Britain, Italy and Japan regarding the policy of the "open door" in China. *For. Rels. of U. S.*, 1899, 140-1; *ibid.*, 1900, 142.

<sup>2</sup> *Am. State Papers, For. Rels.*, I, 184; Moore, *Digest of Int. Law*, IV, 680.

<sup>3</sup> *Annals*, March 7, 1800, 6th Cong., col. 613.

the United States and foreign nations. It is charged neither with making nor interpreting treaties. It is therefore not naturally that member of the government which is to pronounce on the existing condition of the nation with regard to foreign powers."<sup>1</sup>

The above statements manifestly have reference mainly to direct communication with foreign nations. There is nothing physically impossible, however, about a legislative body carrying on foreign relations directly through its own agents. If any proof of this were needed, it would be supplied by our own experience under the Articles of Confederation. That experience, however, also revealed the unsatisfactory results which flow from the conduct of foreign relations by a legislative body. Under the Articles, Congress had the powers of sending and receiving diplomatic representatives—powers which neither Congress nor the Senate can exercise under the present Constitution. Under the latter instrument these powers are transferred to the President, and by custom and practice it has been established that these powers of the President are exclusive, so that he becomes the sole organ of direct communication with foreign governments.

In communicating with foreign governments, Congress, therefore, is limited to the indirect method, which may use as a medium either the President or Secretary of State or a general announcement conveyed to the world through the ordinary channels for the transmission of intelligence. In employing the former means of indirect communication, Congress is dependent upon the consent of the President. It may "request," but may not "direct," the Secretary of State to transmit on its behalf a communication to a foreign government; for the Secretary of State is the agent of the President in handling foreign affairs and conducting correspondence with foreign governments, and whatever direc-

<sup>1</sup> *Works* (Lodge ed.), IV, 139.

tions are issued to him relating to these matters properly come from the President.<sup>1</sup> Thus, when, in 1877, Congress passed two joint resolutions calling upon the Secretary of State to communicate to the Argentine Republic and the Republic of Pretoria acknowledgments of the receipt by Congress of congratulatory messages from these governments, President Grant vetoed both resolutions, on the ground that, in effect, they infringed upon the constitutional rights of the Executive. "The Constitution," he declared, "following the established usage of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers and to receive all official communications from them . . . making him, in the language of one of the most eminent writers on constitutional law, 'the constitutional organ of communication with foreign states.' " <sup>2</sup> The President's veto message was referred to the House Committee on Foreign Affairs, but was never reported therefrom. Even if the resolutions had been repassed over the veto, it is doubtful whether there would have been any legal means of compelling the President or his Secretary of State to transmit them.

If Congress cannot communicate with a foreign government by means of a joint resolution repassed over the President's veto, neither can it do so by means of a concurrent resolution, for to such a resolution the President need pay no attention whatever. This mode, nevertheless, seems to have been supposed possible by the framers of one of the proposed Senate reservations to the Treaty of Versailles, which provided that "notice of withdrawal by the United States (from the League of Nations) may be given by

<sup>1</sup> The act of Congress of July 27, 1789, establishing the State Department (or Department of Foreign Affairs, as it was then called), required the Secretary "to perform and execute such duties as shall, from time to time, be enjoined on or intrusted to him by the President," etc., 1 Stat. at L., 28.

<sup>2</sup> Richardson, *Mess. and Pap. of the Presidents*, VII, 431; Hinds, *Precedents*, II, 1024.



a concurrent resolution of the Congress of the United States.”<sup>1</sup>

The President or his Secretary of State, however, may voluntarily act as a transmitting agent for communications between Congress and foreign governments.<sup>2</sup> Congress may also ask the President to undertake diplomatic or treaty negotiations, and the request may have moral, although not legal, weight in determining the Chief Executive’s action.<sup>3</sup> Moreover, there is nothing directly to prevent communications being carried on between Congress, or either branch thereof, through its presiding officers, or officer, and the minister of a foreign government accredited to the United States, independently of the President and the State Department; and this has sometimes been done.<sup>4</sup> If such communications were obnoxious to the President, however, the recall of the foreign minister by his government could be requested; and if compliance with this request were not forthcoming, he could be dismissed by order of

<sup>1</sup> Cong. Record, March 19, 1920, p. 4899. In this connection it may be mentioned that unauthorized communication with foreign governments was made a criminal offense by the Logan Act of Jan. 30, 1799; R. S. sect. 5335.

<sup>2</sup> Thus, in 1908, House and Senate resolutions expressing sympathy and sorrow in view of the assassination of the King and Crown Prince of Portugal were transmitted by the Secretary of State to the Portuguese Government, and the answer of the Portuguese Foreign Minister transmitted by the Secretary of State to the Speaker of the House. House docs. 741 and 754 and Sen. doc. 317, all of the 60th Cong., 1st sess. Again, in 1912, the Secretary of State transmitted a note of the Chinese minister expressing thanks for a message of congratulation to the people of China, as embodied in a Congressional concurrent resolution. 37 Stat. at L., 1460; House rept. 368, and Sen. doc. 641, both of the 62nd Cong., 2nd sess. In 1919 the State Department transmitted to the Senate a resolution of the National Assembly of Panama asking that body not to change the name of the trans-isthmian canal from Panama to Roosevelt. House doc. 67, 66th Cong., 1st sess. For other instances of a similar character, see Hinds, *Precedents*, II, 1022, 1025.

<sup>3</sup> For example, by a joint resolution of March 2, 1895, Congress requested the President to insist upon the payment by Spain of the Mora claim.

<sup>4</sup> Thus, on June 4, 1920, the Vice President laid before the Senate a communication from the Italian ambassador at Washington on behalf of his government, directed to the Vice President as president of the Senate, and expressing appreciation for the Senate resolution commemorating the anniversary of Italy’s entrance into the war. Cong. Record, June 4, 1920, p. 9104. A similar instance occurred in 1894 when the Speaker laid before the House a cable dispatch from the Government of France to the Speaker acknowledging the action of the House in passing a resolution of sorrow at the assassination of President Carnot. Hinds, *Precedents*, II, 1025.

the President. The same fate might also befall a foreign minister who should hold personal conferences with individual Senators about official matters, if this were distasteful to the President.<sup>1</sup> The President would also have the right to object in the same decisive manner to any attempt on the part of a diplomatic representative of a foreign government to communicate directly with the American people about official matters.<sup>2</sup> In all these cases, the foreign minister would be guilty of the offense of attempting to communicate directly with persons with whom he can properly have no official dealings and of ignoring to that extent the President with whom alone he has the right of communicating on official subjects.

Where, however, no exchange of views is involved, Congress may, in effect, communicate with a foreign government without the intermediation of the President or State Department, by a public announcement transmitted through the ordinary channels of publicity. An example is the declaration of war, which usually comes only after direct diplomatic communication with the government against which it is directed has been severed. The government affected naturally takes cognizance of the declaration without special notification.<sup>3</sup>

<sup>1</sup> On December 14, 1911, Senator Bacon said: "Within the last two months, I have had a conference and quite a discussion with the Russian ambassador regarding negotiations looking to a new treaty with Russia." Cong. Record, vol. 48, p. 372.

<sup>2</sup> A notorious offender in various respects was M. Genet, the French minister, who was recalled at the request of the Washington administration. Moore, *Digest of Internat. Law*, IV, 485-8; 680-1. In his first Lusitania note, May 13, 1915, the Secretary of State, on behalf of the President, called the attention of the German Government to the "surprising irregularity of a communication from the Imperial German Embassy at Washington addressed to the people of the United States through the newspapers." For another instance of the same sort see Moore, *op. cit.*, IV, 682.

<sup>3</sup> This was done also in the case of the Congressional joint resolution of April 20, 1898, authorizing intervention in Cuba. This was in the nature of an ultimatum or virtual declaration of war. Before it could be communicated to the Spanish Government through our minister at Madrid, he received a note from that Government, stating that, in consequence of the Congressional ultimatum, all diplomatic relations were severed. Moore, *op. cit.*, VII, 170.

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## CHAPTER XIII

### POPULAR CONTROL OF FOREIGN POLICY

**I**T is frequently alleged that secret diplomacy was one of the potent causes of the World War. Nations were committed to certain lines of action by secret treaties and agreements of which the people of the nations concerned knew nothing. Such things were possible because in European governments the executive very largely controls foreign relations. In most instances treaties do not have to be submitted for ratification to legislative bodies composed of representatives of the people. Fortunately, in the United States, secret treaties are not possible, on account of the necessity of Senatorial approval.<sup>1</sup> In European countries, therefore, control over foreign policy is more concentrated and bureaucratic; while in the United States it is more diffused and democratic. Our diplomacy has sometimes been characterized as of the "shirt-sleeve" variety, that is, straightforward and direct, avoiding the devious ways of the overspecialized or bureaucratic diplomat. It has also been characterized as "housetop" diplomacy, that is, moving frankly and in the open. Although there has been some measure of truth in this characterization, in the actual conduct of diplomatic negotiations, our State Department takes the public into its confidence as little as do the foreign offices of other governments. Moreover, it should not be supposed that, merely because all treaties must be approved by the Senate, we have actual popular control of foreign policy in this country. Not even the Senate is sufficiently well informed upon questions of foreign policy always to pass upon them intelligently. To an even greater

<sup>1</sup> Executive agreements, however, may be kept secret.

extent the ignorance of the mass of the people upon such matters precludes a rational grasp and judgment regarding them. Lord Bryce says that "the masses of the people do not in any European country know enough of foreign countries to enable them to form sound opinions in particular crises."<sup>1</sup> This is even more true of the mass of the people in the United States.

The failure of popular control over foreign policy has been due in part to a lack of interest among the people in foreign affairs. People as a rule are interested only in the things that touch their daily lives intimately. Foreign affairs have seemed too remote to be worth the effort to understand. This, however, is no longer as true as formerly it was. The world is shrinking and, largely as a result of the World War, people in the United States as well as in European countries, are realizing to a greater extent the importance of foreign relations. The automobile manufacturer of Detroit, for example, and the farmer of the Middle West are interested in the foreign market as an outlet for their surplus products.

If the people are to exercise control over foreign relations, they must have, in addition to an interest in foreign affairs, adequate sources of information regarding them. Without accurate and unbiased information, there can be no sound judgment. As a former Secretary of State, Mr. Root, has said, "When foreign affairs are ruled by Democracies the danger of war will be in mistaken beliefs. The world will be the gainer by the change, for, while there is no human way to prevent a king from having a bad heart, there is a human way to prevent a people from having an erroneous opinion. That way is to furnish the whole people, as a part of their ordinary education, with correct information about their relations to other peoples, about the limitations upon their own rights, about their duties to respect the rights of others, about what has happened and

<sup>1</sup> *International Relations*, 186.

is happening in international affairs, and about the effects upon national life of the things that are done or refused as between nations; so that the people themselves will have the means to test misinformation and appeals to prejudice and passion based upon error.”<sup>1</sup>

The principal source of popular information on foreign, as well as domestic, affairs is the newspapers. With a few notable exceptions, newspapers leave something to be desired as sources of information and means of publicity in foreign affairs. It must be remembered that newspapers are primarily commercial enterprises run for the profit of their owners. This profit is derived mainly from advertising, whose lucrativeness depends largely on the size of the circulation. The aim of editors and managers of newspapers is to build up circulation by giving the people what they want. They print what has news value. This may be sensational and not based on a true perspective of foreign affairs. Both the editorial opinions as well as the news items are sometimes jingoistic in tone and imbued with a narrow nationalism. If a controversy arises between the United States and some foreign government, many newspapers are afraid to express an opinion favorable to the contention of the foreign government for fear of being called unpatriotic and of losing readers.

Quite aside from the shortcomings of the newspapers, there are certain natural limitations upon the extent and nature of the information regarding foreign affairs which the people are capable of using. It is obvious that the people are not capable of exercising control over the details of foreign policy. Nor are they in a position to exercise direct control over matters requiring quick decision. In such cases the defects of control by a deliberative assembly would be increased many-fold. The people cannot be informed as to details and technical matters. They can-

<sup>1</sup>“A Requisite for the Success of Popular Diplomacy,” *Foreign Affairs* I, 5.

however, be informed as to underlying principles. They are capable of passing on broad and simple questions of general foreign policy which are of a continuing nature so that there is time for mature deliberation in considering them. In regard to such questions, their opinions and decisions are likely to be fairer and more imbued with common sense than are those of the overspecialized bureaucracy which is charged with the conduct of foreign relations.

Publicity is an essential condition and means of popular control, but the extent of desirable publicity regarding foreign policy is logically limited by the extent to which the people can control such policy. Spurred on by the desire to do away with the secret diplomacy which was so potent an influence in bringing on the World War, President Wilson laid down as the first of his famous fourteen points: "Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view." This point is still misunderstood by some persons. It was not intended to mean that diplomats should meet in glass houses and carry on all their negotiations in the full glare of publicity. Such a requirement would usually be fatal to the success of the negotiations. The diplomats are expected to reach an agreement by reconciling conflicting national policies. This they can only do by compromise and mutual concession. If the negotiations were carried on in public, however, compromise would be difficult if not impossible. As has been pointed out, a diplomat or negotiator who publicly yields the extreme claim of his government is digging his political grave. All that President Wilson meant by this point was that the results arrived at by the negotiations should be made public, so that the nation should not be committed to any agreements or undertakings of which it is unaware. His principle is not inconsistent with keeping the negotiations secret, provided the general policy and purpose of the nego-

tiations are publicly known and the conclusion of the negotiations is announced for public approval.

#### INFLUENCE FOR PEACE

Since the World War the tendency has been in the direction of a greater degree of popular control over foreign policy. The question may be raised as to whether this tendency is likely to make for war or peace. It must be admitted that the temper of the people is not always peaceful. The people sometimes seem to have a superficial peaceful veneer but an underlying pugnacity, which on occasion may sweep the government into war even against its will. The best illustration of this situation in our history was the Spanish War of 1898. Spain offered to arbitrate the question at issue, and the diplomats by mutual concessions might have smoothed over the differences between the two countries. But the war excitement in the country and in Congress seethed and the demand for war became so great that President McKinley finally yielded to the clamor. In 1895 and in 1916, at the time of our difficulties with England and Mexico respectively, there was also considerable popular demand for war, which in both cases was only narrowly averted.

Although the temper of the people has sometimes been bellicose, with the increase of popular education regarding and understanding of, foreign relations, the tendency of popular control will be in the direction of peace. Under the system of democratic control, obviously aggressive war is hardly possible. When the issue is not beclouded by misleading information and false propaganda, the people can be depended upon, as a rule, to restrain the government from embarking upon a war of conquest and exploitation. The danger of war is increased by the struggle of nations for markets and raw materials and by the competition of capitalists in backward countries. The mass of the people,



however, are not interested in the exploitation of backward peoples in the interests of plutocracy, and consequently the likelihood that wars of this character will be embarked upon may be expected to grow less with the increase of popular control.

It must not be supposed that popular control can ever reach the point where it can take over the actual handling of foreign relations. From its very nature—requiring quick decision and prompt action—this must remain concentrated in the hands of one or a few men. But the power thus exercised must be subject to adequate responsibility. How is this responsibility to be secured and enforced? One of the most effective instruments for this purpose is publicity. It is for this reason that the Covenant of the League of Nations requires all treaties entered into by any member of the League to be registered with the Secretariat and to be published by it.<sup>1</sup>

Ordinarily popular control over foreign relations must be exercised through the elected representatives of the people in the political departments of the government. They are elected as candidates of political parties which, in their platforms or in the utterances of their candidates, are likely to have taken some stand on questions of foreign policy.<sup>2</sup> Because of party timidity, or the ambiguity of platforms, or because of the confusion of foreign and domestic issues, however, the position of the party in power on foreign questions may be doubtful and there may have been no clear mandate from the people.

#### PROPOSED REFERENDUM ON WAR

In order to secure a clear popular mandate upon such a momentous issue as that of war or peace, it has been suggested by Bryan, La Follette, and others that a national

<sup>1</sup> Article 18.

<sup>2</sup> On the question of political parties and war, see Appendix X.

referendum should be held upon this question whenever it arises. Bryan expressed the opinion that such a referendum "would give greater assurance of peace than any other provision that could be made."<sup>1</sup> While not always recognized by those who advocate such a referendum, there are four conditions attaching to this proposal without which there would be no chance of its being practicable. Three of these were, however, recognized by Senator La Follette, who, during the debate over the entrance of the United States into the League of Nations, proposed the following reservation:<sup>2</sup>

"The United States hereby gives notice that it will withdraw from the league at the end of five years from the date of the exchange of ratifications of this treaty, unless within that time each member of the league shall have agreed that in no case will it resort to war except to suppress an insurrection or repel an actual invasion of its territory, until an advisory vote of its people has first been taken on the question of peace or war."

Although the reservation was not adopted, as will be noted, it embodied three conditions, *viz.*, (1) The requirement of a referendum would not apply when the country was actually attacked or invaded. (2) The referendum would be merely advisory and not controlling, so that if the Government deemed the necessity great enough it could disregard it. This would not render the referendum entirely useless, because it would be followed unless there were strong reasons to the contrary, and it would assist the Government in deciding what to do in doubtful cases. For example, at the time of the sinking of the *Lusitania* by a German submarine in 1915 with the loss of the lives of American citizens, many persons in the United States clamored for a declaration of war against Germany. The President rightly judged, however, that the mass of the

<sup>1</sup> Quoted in Cong. Record, January 22, 1920, p. 1966.

<sup>2</sup> Cong. Record, November 25, 1919, p. 9410.

people were not yet in favor of war, but if he had been in doubt, a referendum would have assisted him in reaching a decision. (3) The third condition attached to this proposal is that no one nation alone could carry it out but it must be based upon an agreement among all the powerful nations that each of them will likewise hold a popular referendum on the question before resorting to war. (4) The fourth condition, which Senator La Follette's proposal failed to recognize, is that before such a referendum could be valuable or successful there must be greater popular knowledge and understanding of foreign affairs and more widespread and dispassionate study of them than now exists. Subject to these conditions, the proposal for a referendum on war would seem to have some value.

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## CHAPTER XIV

### THE STATES AND FOREIGN RELATIONS

THE conduct of a nation's foreign relations may be affected to a considerable extent by the form and character of internal governmental organization. Speaking generally, an energetic and effective foreign policy is possible for a nation in proportion as its government exhibits unity and coherence. This is true with reference to the relations not only between the departments of the central government, but between the central government and the local or state governments. In countries whose government is based on the federal plan, therefore, an important question to be considered is the amount, if any, of control over foreign relations which is assigned to the divisional governments. The tendency in federal, and even in confederate, governments is to restrict within very narrow limits, if not absolutely to prohibit, any direct control of the states, or other divisions, over foreign relations.

Under the Articles of Confederation the diplomatic, war, and treaty powers were, in express terms, vested in the central government, and the powers of the states in those respects were restricted within narrow limits. The Articles, however, preserved the legislative power of the states over foreign commerce, even as against the power of the central government to enter into commercial treaties, and in practice this operated as a serious limitation upon the central government's control over foreign relations. The confusion resulting from divided jurisdiction over commerce was one of the principal difficulties leading to the adoption of the Constitution.

## DIRECT INFLUENCE

The experience gained under the Articles led to the placing in the Constitution of strict limitations upon the power of the states in connection with foreign relations. The states were absolutely prohibited from making treaties, and treaties made under the authority of the United States were declared to be the supreme law of the land, notwithstanding anything to the contrary in the laws of any state. Moreover, except with the consent of Congress, the states were prohibited from entering into any agreement or compact with a foreign power and from engaging in war, unless in imminent danger of invasion.<sup>1</sup> The term "war" properly denotes an armed conflict between nations and, as here used, probably refers to danger from a foreign source or from Indians.<sup>2</sup>

In 1839 our relations with Great Britain became strained on account of a dispute over the location of the boundary line between Maine and Canada. Maine and New Brunswick marched opposing forces into the disputed territory, bringing on what is known as the "Aroostook War." The United States and Great Britain, however, entered into negotiations for a treaty to settle the dispute. "It was deemed necessary on the part of our Government to secure the coöperation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the Secretary of State

<sup>1</sup> The powers of the states, moreover, are restricted with reference to the regulation of foreign commerce and the levying of import and export duties. It should be mentioned, too, in this connection that the state courts are excluded from jurisdiction in cases to which foreign ambassadors, other public ministers, or consuls are parties.

<sup>2</sup> Willoughby, *Constitutional Law of the United States*, II, 1239. Chief Justice Taney, in *Luther v. Borden* (7 How., 1) declared that Rhode Island, during Dorr's Rebellion, was in a state of war; but this was a misuse of the term, as was pointed out by Justice Woodbury in his dissenting opinion.

and, after much negotiation, the claims of the two states were adjusted and the disputed questions of boundary settled.”<sup>1</sup> The result was the Webster-Ashburton Treaty of 1842, wherein (Art. V) the United States agreed to receive and pay over to Maine and Massachusetts their share of the “disputed territory fund,” and also to compensate those states by the payment of a further sum of money on account of their assent to the boundary line fixed by the treaty.<sup>2</sup>

Although the claims of the two states were thus recognized by the treaty, they were not adjusted directly by the states, but rather by the Government of the United States acting in their behalf. An American writer suggests that Webster did not consider the coöperation of the state authorities a constitutional necessity, but merely thought it expedient from a political standpoint that the opinion of these states should be considered.<sup>3</sup> This author admits, however, that the states might possibly have international dealings with reference to such an unimportant matter as the administration of fishing upon boundary waters.<sup>4</sup> In this connection it has been suggested by another writer that a state might enter into an agreement with Canada or a bordering Canadian province to regulate fisheries in their contiguous waters, in the absence of a formal treaty by the United States covering the subject. “May there not properly be,” this writer asks, “an autonomy in local external affairs, at least as to the states bordering on Canada or Mexico, just as there is a local autonomy in matters purely domestic?”<sup>5</sup>

The question came before the Supreme Court in 1840 as to whether the surrender to Canadian authorities by the

<sup>1</sup> *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S., 541, quoting Webster, *Works*, V, 99; *ibid.*, VI, 273.

<sup>2</sup> Malloy, *Treaties*, etc., I, 654.

<sup>3</sup> Willoughby, *op. cit.*, I, 509.

<sup>4</sup> *Ibid.*, I, 508, note 23.

<sup>5</sup> J. F. Barrett, “International Agreements Without the Advice and Consent of the Senate,” *Yale Law Journal*, XV, 23, 27 (Nov., 1905). But see, *contra*, Butler, *Treaty-Making Power*, I, sect. 123.

governor of Vermont of a fugitive from justice was within his constitutional power. No judgment was rendered in the case, since the court was equally divided on the question of jurisdiction; but a majority of the judges, including Chief Justice Taney, were of the opinion that the governor did not have the power to deliver up the fugitive to a foreign government. In his opinion Taney pointed out that such a delivery involves an agreement with a foreign government, which the states are not competent to make without the consent of Congress.<sup>1</sup> Many years later the same court declared, *obiter*, that "there can be little doubt as to the soundness of the opinion of Chief Justice Taney that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the Federal Government; and that it is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the states to enter upon the relations with foreign governments, which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives. At this time of day and after the repeated examinations which have been made by this court into the powers of the Federal Government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of the Union and a foreign government."<sup>2</sup>

The governor of a state from which a fugitive from justice has fled to a foreign country must ordinarily act through the Secretary of State at Washington in demand-

<sup>1</sup> Holmes v. Jennison, 14 Pet., 540.

<sup>2</sup> United States v. Rauscher, 119 U. S., 407 (1886).

ing from such government the return of the fugitive in accordance with extradition treaties between the two countries. This, however, does not hold where there are acts of Congress or treaties of the United States expressly authorizing extradition proceedings to be conducted by the governor of a state directly with the authorities of a foreign government. Thus, our treaty of 1861 with Mexico empowered the chief executives of the border states and territories to make requisitions and to grant extradition in certain cases.<sup>1</sup> Again, our extradition conventions with Denmark and the Netherlands provided that application for the surrender of a criminal may be made directly to or by the governor or chief magistrate of the island possession or colony of the respective countries.<sup>2</sup> In such cases, it may be said that the chief executive of the state or territory is acting primarily as the agent of the United States Government.

In general, however, direct contact of the state governments with foreign governments is, under the Constitution, reduced to a negligible quantity. The ruling doctrine on this matter has been laid down by the Supreme Court in a number of cases. Thus, in the *Arjona* case, wherein was upheld a Federal statute punishing the counterfeiting in the United States of the securities of foreign nations, the Court said: "The Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. . . . Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States."<sup>3</sup> Again, in the Chinese exclusion case, the Court said: "For local interests, the several states of the Union exist; but for international purposes, embracing our relations with foreign nations,

<sup>1</sup> Malloy, *op. cit.*, 1126. This provision was renewed by the treaty of 1899. *Ibid.*, 1188. Cf. Moore, *Extradition*, I, 53-78.

<sup>2</sup> Malloy, *op. cit.*, 395, 1272.

<sup>3</sup> *United States v. Arjona*, 120 U. S., 479.



we are but one people, one nation, one power.”<sup>1</sup> The same view is stated by the Court in the *Legal Tender* case: “The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments.”<sup>2</sup>

#### INDIRECT INFLUENCE

Although the general principle, as thus laid down by the Supreme Court, is undoubtedly correct as far as direct control by the states over foreign relations is concerned, it is still possible for the states to take action which will indirectly affect such relations. The extent of this indirect influence may, of course, vary considerably. State legislatures not infrequently pass resolutions petitioning Congress or the Executive to take or not to take certain action in connection with our foreign relations, or expressing congratulation or sympathy with particular foreign countries.<sup>3</sup> Such a resolution is likely to be a mere *brutum fulmen*, and is usually pure buncombe. The feeling is apparently growing that a state legislature ought not thus to attempt to take a hand in foreign affairs, unless, at all events, the situation or policy aimed at is deemed peculiarly to affect the welfare of the state.

A more important method by which a state may indirectly influence foreign relations is the taking of action which may purport to affect the status of aliens residing in such state, or failure to take action for their protection in the exercise of rights which they claim under treaties. This point is thus set forth in a Senate document relating to the power

<sup>1</sup> *Chae Chan Ping v. United States*, 130 U. S., 581, 606. Cf. *Fong Yue Ting v. United States*, 149 U. S., 698.

<sup>2</sup> *Knox v. Lee*, 12 Wall., 457, 555.

<sup>3</sup> Thus, in 1897 the Senate of Nebraska adopted a resolution extending sympathy to Cuba. U. S. Senate doc. 82, 54th Cong., 2nd sess.

of recognition: "A state of the Union, although having admittedly no power whatever in foreign relations, may take action uncontrollable by the Federal Government, and which, if not properly a *casus belli*, might nevertheless as a practical matter afford to some foreign nation the excuse of a declaration of war. We may instance the action which might have been taken by the state of Wyoming in relation to the Chinese massacres, or the state of Louisiana in relation to the Italian lynchings, or by the state of New York in its recent controversy with German insurance companies with relation to the treatment of its own insurance companies by Germany."<sup>1</sup> As to whether the action of the states in such matters is, in all cases, uncontrollable by the Federal Government, there may be some question. Judging, however, by the number of instances in which the nation has been embroiled in international difficulties by the action or non-action of states, it would seem that no effective means of preventing such state interference has yet been devised.

Some of the difficulties encountered have arisen from the failure of states to protect aliens against individual or mob violence and to provide means of redress for injuries thus inflicted. Congress could probably constitutionally provide such means of redress through federal agencies, but it has thus far failed to do so.<sup>2</sup> Other difficulties arise from the passage of acts or ordinances by states or municipalities which discriminate, or are alleged to discriminate, against aliens in violation of their treaty rights. Among these measures are labor laws, land laws, and laws or ordinances regulating the privilege of attending the public schools. Some have been declared unconstitutional by the courts as in violation of treaty provisions. Probably the most conspicuous of the state laws and local ordinances which have given rise to international difficulties are the San Francisco

<sup>1</sup> U. S. Senate doc. 56, 54th Cong., 2nd sess., p. 5.

<sup>2</sup> *Baldwin v. Franks*, 120 U. S., 678.

school ordinance and the California alien land law, aimed at aliens ineligible to citizenship. Public sentiment on the matter in California is strikingly indicated by the adoption in 1920, through the popular initiative, and by a vote of three to one, of an alien land law, to which Japan objected as being in violation of treaty rights.<sup>1</sup>

The treaty-making power has itself at times sought to avoid conflicts with the states which would be likely to arise from national regulation of matters that otherwise would be under state control. Provisions have been inserted in treaties which, instead of purporting directly to determine

<sup>1</sup> The action of the people of California in enacting directly through the popular initiative this alien land law is an example of popular influence in foreign affairs, exercised in a somewhat novel fashion. The desirability of having the support of public opinion in the conduct of foreign relations has been recognized by various Presidents, who have sometimes made direct appeals to the people on behalf of particular policies. The importance of public opinion among us in such matters has also been recognized by other governments, as was illustrated by their attempts to influence it, before our entrance into the World War, through securing control of newspapers and other means of publicity and propaganda. Much has been said in favor of full publicity as a condition of democratic diplomacy. Intelligent and judicious influence by the people upon foreign relations presupposes, however, a considerable amount of popular information on such matters. The extent of desirable publicity in foreign policy is logically limited by the extent to which the people can exercise an effective control, and that reaches only to general policies and not to details or matters requiring quick decision. Some persons have advocated a popular referendum on the question of peace or war as a preliminary step to the entrance into war by the United States. W. J. Bryan has gone on record as declaring that "a referendum on war would give greater assurance of peace than any other provision that could be made." (Editorial reprinted in Congressional Record, January 22, 1920, p. 1966.) The delay, however, which would ensue before a decision could be arrived at, if such a plan were adopted, would seem alone to be sufficient to render the idea impracticable. Furthermore, the inherent defects of the control of foreign policy by a deliberative assembly would be greatly enhanced by the adoption of such a plan. Often there is no time for consulting the popular will and, even if it were done, in many cases no clear answer would or could be given. It would be difficult to frame the issue, for the maneuvers of the foreign government would be an uncertain and uncontrollable factor in the situation. The objections to the popular referendum in foreign affairs have been summed up as follows: "The referendum is not advisory in any honest sense of the word, because the decision of the government must be composed of an intricate series of problems which cannot be isolated. On most of the points the answer is not yes or no, but a course of action with many ramifications of detail. A government dependent on referendum for advice about every crucial point could survive only in a world where magic kept everything frozen tight while the referendum was being taken. In a world of swift action, of surprises, of intrigue, there can be neither safety nor success for an administration which had no power to act." (*New Republic*, February 24, 1917, p. 92.)

the point in question, merely constitute an undertaking on the part of our Government to recommend to the states that the appropriate action be taken. The earliest example of this is the treaty of 1783 with Great Britain, in which (Art. V) it was agreed that the Congress of the Confederation should "earnestly recommend to the legislatures of the respective states to provide for the restitution of all estates" of British subjects.<sup>1</sup> Other examples may be found in treaties made since the adoption of the Constitution. Thus, Article VII of the treaty of 1853 with France provided that "as to the states of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right."<sup>2</sup>

Instances of this sort have, however, been rare; and, as has been pointed out, if the United States were required, as a rule, to resort to such procedure, the ultimate result would be that few nations would be willing to grant us privileges in exchange for a mere promise on the part of our Government to recommend to the states the granting of similar concessions.<sup>3</sup> The courts have construed the treaty-making power as extending to all matters which are appropriate subjects of international negotiation,<sup>4</sup> and, as the Supreme Court declared in the *Arjona* case, "the national government is . . . responsible to foreign nations for all violations by the United States of their international obligations."<sup>5</sup> This being the case, it follows that the National Government must have power commensurate with its responsibility. Ultimately, by Congressional action, or by constitutional amendment if necessary, means of control

<sup>1</sup> Malloy, *Treaties*, etc., I, 588.

<sup>2</sup> *Ibid.*, I, 531. Cf. a similar provision in the treaty of 1871 with Great Britain, *ibid.*, I, 711.

<sup>3</sup> Crandall, *Treaties, Their Making and Enforcement*, 267.

<sup>4</sup> *De Geofroy v. Riggs*, 133 U. S., 256, 266-7. Cf. *Missouri v. Holland*, 252 U. S., 416.

<sup>5</sup> *United States v. Arjona*, 120 U. S., 479.

must be provided for the full preservation of treaty rights by the National Government. At the same time, care should be taken, as far as possible, that no treaty engagements be entered into whose execution will arouse the deep-seated hostility of the great majority of the people in particular states.

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## CHAPTER XV

### THE DEPARTMENT OF STATE

**I**N the conduct of foreign relations, the President, although ultimately responsible to the people for the general success or failure of policies pursued and efforts made, is unable, of course, to give his personal attention to any questions of policy except those which he deems to be the most important and momentous. For handling the great mass of routine matters, and even for the determination of many questions of policy which are of considerable importance, he is dependent upon the assistance of the agencies supplied for that purpose. These agencies are, principally, the department of state, the diplomatic service, and the consular service. The three are, in reality, parts of one system, which has its head office in Washington and its agents in every part of the world. For purposes of convenience, however, they may be considered separately.

### HISTORICAL DEVELOPMENT

Although the Constitution definitely provides for the appointment by the President of diplomatic and consular agents, no specific provision is made in that instrument for the creation of an executive department of the government to handle foreign affairs. That various executive departments would be created was, however, implied in the stipulations that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices" and that Congress may vest the appointment of inferior officers in the President alone or in the

heads of departments. Except negatively, through his veto power, the President has no legal control over the creation of such departments. They can be established only by Congressional statute; and Congress proceeded to exercise this power very shortly after the government went into operation under the present Constitution. An act of July 27, 1789, created a department of foreign affairs, at whose head was placed a secretary of foreign affairs. This officer was, of course, to be appointed by the President with the advice and consent of the Senate, but considerable debate arose in Congress as to whether the President should also have the power of removing him from office. Upon this point the Constitution was silent. Some members of Congress were of the opinion that, on the analogy of the method of appointment, the President should have the power to remove only with the consent of the Senate. James Madison strongly opposed this view, on the ground that such a plan might have the effect of making an administrative officer who was supposed to be subordinate to the President in reality independent of him. Since the President must bear the responsibility for the conduct of foreign relations, he should have power over the head of the department of foreign affairs, without interference, other than by way of advice, from the Senate. This view finally prevailed, but it was considered improper expressly to confer upon the President the power of removal, since this might be construed to imply that he had no such authority under his general executive power, unless conferred by statute. Consequently, as finally passed, the act merely implied the existence of the power of removal in the President without expressly conferring it.

The duties of the secretary for the department of foreign affairs and his relation to the President were specified in the act as follows: "To perform and execute such duties as shall, from time to time, be enjoined on or intrusted to him by the President of the United States, agreeable to the

Constitution, relative to correspondence, commissions, or instructions, to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department, and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall, from time to time, order or instruct.”<sup>1</sup>

After the establishment of the original executive departments it was found that there were certain necessary executive matters which did not fall within the assigned field of any of the departments. They were such matters as are ordinarily attended to by the Home Secretary in other governments. It was decided, however, not to create a separate home department, and in September, 1789, these duties in relation to home affairs were imposed upon the department for foreign affairs, and the name of the department was changed to “Department of State” and that of the chief officer in the department to “Secretary of State.” These duties relating to home affairs included at first the preservation and promulgation of the laws, the keeping of the great seal and the official records of the Government, and the attestation of commissions and proclamations by affixing the seal to them. Shortly afterwards, further duties connected with home affairs were assigned to the Department of State, notably those connected with patents, copyrights, the census, and supervision of the territories. These last-mentioned functions were, however, transferred to the Department of the Interior upon its creation in 1849. The duties relating to home affairs still retained by the Department of State include those connected with the election of the President and Vice President, the adoption of

<sup>1</sup>1 Stat. at L., 28.



amendments to the constitution, and the custody of the seals and archives of the Government. The Secretary of State also publishes the laws and resolutions of Congress and acts as the medium of correspondence between the President and the state governors. These functions are purely formal. They add no prestige or influence to the office of Secretary of State and might, without loss, be transferred to the Department of the Interior.

The first Secretary of State appointed by President Washington after the creation of the department was Thomas Jefferson, and the subsequent occupants of the office include many of the most distinguished statesmen of the country, notably Marshall, Madison, Monroe, J. Q. Adams, Clay, Webster, Calhoun, Marcy, Blaine, Olney, Hay, and Root. Many of the secretaries had, before their appointment, rendered eminent service in the halls of legislation and as diplomatic representatives of their country. Six of them subsequently became President of the United States.

#### THE OFFICE OF SECRETARY

The office of Secretary of State has, at times, been one of great political importance, and has occasionally even overshadowed, to some extent, that of President. Although the Secretary is, of course, legally the subordinate of the President and entirely responsible to him for his acts, nevertheless in practice the department chief may, through his dominating personality, be the determining factor in the control of foreign relations. Thus, during the administration of President Harding, Secretary Charles E. Hughes was in practically complete control not only of the administration of our foreign relations but also of the determination of our foreign policies. This was illustrated by the leading part which he played in the deliberations of the Washington Conference of 1921 and in relation to the other important international questions confronting the Adminis-

tration, such as the peace settlement with Germany and relations with the nations of the Far East and the powers with which we had been associated in the World War. Although the President officially receives diplomatic representatives accredited to this Government, he does not, as a rule, hold communications directly with such representatives on official matters. On the contrary, such communications regularly pass through the hands of the Secretary. While the Secretary may thus act as the medium of communication between the President and the diplomatic representatives of other countries, most matters, unless of unusual importance, are handled finally by the Secretary himself. Since the ultimate responsibility, however, rests upon the President, he may, when foreign relations become especially important, take their conduct largely into his own hands.

Among recent presidents of dominating personality who have done so may be mentioned Roosevelt and Wilson. Thus, in helping to bring about a settlement of the Russo-Japanese War in 1905, President Roosevelt appealed by cable directly to the Mikado, rather than through the more usual agencies of communication. Again, in the matter of the revolution in Panama in 1903 which led shortly afterwards to our securing control of the Canal Zone, Roosevelt at first merely gave instructions to Secretary Hay but later assumed direct control of the matter and entire responsibility for the dénouement.

Until after the outbreak of the World War in Europe, President Wilson's interests and energies were directed mainly to domestic affairs, and consequently he left his first Secretary of State, William Jennings Bryan, a somewhat freer hand in determining our foreign policy than he accorded to his successors. Bryan was an ardent lover of peace and his principal achievement during his tenure of the office was the negotiation of a series of treaties, known as "wait-a-year" or "cooling-off" treaties, by which the

signatory powers agreed that if a dispute arose between them not susceptible of settlement by ordinary diplomatic negotiation, they would not go to war with each other for a period of one year, during which time a commission of inquiry should investigate and report on the controversy. After the outbreak of the World War, Bryan's peace-at-any-price policy failed to meet President Wilson's approval, and the former soon resigned. Wilson then became virtually his own Secretary of State, and continued so during the remainder of his administrations. The men nominally occupying the office, beginning with Robert Lansing, were allowed practically no initiative or determining voice in the formulation of our important foreign policies. They were reduced to the position of administrative assistants to the President, with the functions of relaying the President's notes to foreign governments and of transmitting to him communications received therefrom. During the period of our neutrality from 1914 to 1917, we sent many protesting notes to the belligerent powers on both sides which were signed with the name of the person who for the time being occupied the office of Secretary of State, but they were in the main really written by the President.

The Secretary of State has assumed a rather vague and ill-defined priority over the other members of the President's Cabinet. In the compensation which he receives and in his legal status and powers, he has no superiority over them; he does not occupy a position corresponding to that of the Prime Minister in England and other countries. But, on account of the delicate nature of the duties which he is called upon to perform, he usually enjoys a more confidential relation with the President than do other members of the cabinet. He occupies a seat immediately at the President's right at cabinet meetings. During the period of the "Virginia dynasty," three Secretaries of State passed from that office to the Presidency, and this gave rise to a popular impression, which long prevailed, that the

Secretaryship forms a stepping-stone to the Presidency. It is usual in Congressional acts to enumerate the Secretaryship of State first among the cabinet offices, and by act of 1886 Congress has provided that, in case of vacancy in the offices of both President and Vice President, the succession to the Presidency shall pass to the various members of the cabinet, beginning with the Secretary of State. If a President or Vice President resigns from office, his resignation should be sent to the Secretary of State. In all matters of ceremonial procedure the Secretary of State takes priority over the other members of the cabinet. Although legally he has, of course, no control over the appointment of the other members of the cabinet, in practice he is sometimes appointed first by the President from among the leading men of his party and is then consulted in the appointment of the other department heads.

The Secretary of State conducts negotiations with foreign countries either through the diplomatic representatives of those countries accredited to the United States or through the American representatives stationed abroad. The choice between these two methods rests with the nation which takes the initiative in the conduct of negotiations. Ordinarily, it will choose to have them carried on at its own capital.

#### DEVELOPMENT OF DEPARTMENTAL ORGANIZATION

The Secretary of State not only conducts foreign relations through the channels indicated, but also acts as the central directing authority over officers and employees of the department. Originally the department consisted, besides the Secretary, of only two clerks, and there was little or no differentiation of function between them. Gradually, however, as the work increased, the number of clerks grew, and each clerk was assigned to some particular group of duties. This differentiation or division of labor constituted,

in embryo, that classification of the work of the department which later brought into existence the various bureaus. There developed, at the same time, a need of greater integration through more general oversight and direction than could be furnished by the Secretary alone. Consequently, the offices of assistant secretary of state and second and third assistant secretaries were created by acts of Congress passed in 1853, 1866, and 1874 respectively. Formerly, the assistant secretary succeeded to the office of acting Secretary when the head of the department was absent, and, when so acting, he had the same legal powers as the Secretary. In consequence he was usually considered a political officer, who should have the same party affiliation as the President and Secretary; while, on the other hand, the second and third assistant secretaries came to be regarded as permanent officials whose tenure ought not to be, and ordinarily would not be, affected by a change in party control. In addition to the three assistants, attempts were made from time to time to secure the creation in the department of a permanent under-secretary of state to exercise functions analogous to those of the chief of staff in the War Department. As a result of these efforts, the office of under-secretary was virtually established in the department through appropriation acts of Congress, the title of the office of counselor, originally established in 1909, being changed to under-secretary of state. Finally, by an act of 1923, the office of under-secretary of state was established upon a more regular and permanent basis.

There is also in the department a chief clerk, who is a part of the general administration of the department and exercises supervision over the other clerks in certain matters of a routine character. Much of the work of the department is classified under certain heads and assigned to a number of offices, bureaus, and divisions, over each of which is a chief, appointed by the Secretary.

The functions of these various agencies are subject to

change from time to time at the order of the Secretary. This is in accord with the provision of an act of Congress passed in 1874, as follows: "The Secretary of State may prescribe duties for the assistant secretaries, the solicitor, not interfering with his duties as an officer of the department of justice, and the clerks of bureaus, as well as for all the other employees in the department, and may make changes and transfers therein when, in his judgment, it becomes necessary."

In 1909, Mr. Elihu Root, who was Secretary of State at the time, is quoted as having remarked that he was like a man trying to conduct the business of a large metropolitan law-firm in the office of a village squire.<sup>1</sup> The work of the department had grown until its personnel and organization had become inadequate. Among the causes of this development were the increase in our foreign trade (particularly our export trade in manufactured products as differentiated from raw materials), the many questions growing out of the war with Spain, the increasing number of Americans having property interests abroad, the swelling immigration to the United States, and the enactment of the tariff law of 1909, placing upon the President the duty of administering the maximum and minimum tariff rate provision.<sup>2</sup> All of these matters raised questions which had to be given attention by the State Department. In order better to fit the department for its enlarged tasks, a reorganization was brought about through the creation of a number of new offices and divisions. Among these may be mentioned the director of the consular service and various politico-geographical divisions. In 1909 were created the divisions of Latin American Affairs, of Western European Affairs and of Near Eastern Affairs. The division of Far Eastern Affairs had been created in the previous year, while the divisions of Mexican Affairs and of Russian Affairs fol-

<sup>1</sup> *The Nation*, Vol. LXXXIX, 294 (September, 1909).

<sup>2</sup> *Outline of the Organization and Work of the Department of State*, 9-11.

lowed in 1915 and 1919 respectively. These are special organs created to take care of diplomatic, consular, and miscellaneous correspondence in relation to the principal geographical sections of the world in which the United States has important interests. This specialization of functions is designed to secure and to train experts in matters of interest to our Government connected with the particular geographical section. As a part of the reorganization of 1909, there was also created a functional division known as the division of information designed to collect and distribute to the diplomatic service information regarding the principal negotiations in progress between the United States and various foreign governments. A suggestion that this practice be adopted was made by Dallas as early as 1857.<sup>1</sup>

The Rogers Act of 1924, while concerned mainly with the field service, made some changes in the organization of the central department. It provided that the second and third assistant secretaries of state should hereafter be known as assistant secretaries of state, without numerical distinction of rank. It abolished the position of director of the consular service, but established in the department an additional assistant secretary of state.

#### EXISTING ORGANIZATION

The organization of the State Department is not fixed, but is constantly changing. This is natural and inevitable in a living organism, because the proper organization at any given time should be adapted to the work and functions which the department has to perform, while the nature and extent of these vary from time to time in accordance with the changes in world conditions as they affect the United States. It is inevitable, furthermore, that the aptitudes and capacities of the executive officers in the department

<sup>1</sup>Moore, *Digest of Internat. Law*, IV, 782.

should also vary from time to time. By executive or departmental order, changes in the organization may be made at any time. Consequently, any statement of the existing organization of the department is likely to be out of date, at least in part, in a few months. Nevertheless, as a matter of historical, if not of current, interest, the organization as it existed in 1937 may be stated as follows:

- The Secretary of State
- The Under-secretary of State
- Four Assistant Secretaries of State
- The Foreign Service Personnel Board
- The Legal Adviser
- Twenty-three assistants to the Legal Adviser
- The Economic Adviser
- The Chief Clerk

Politico-geographical Divisions:

- Far Eastern Affairs
- American Republics
- European Affairs
- Near Eastern Affairs

Functional Divisions:

- Treaty
- Passports
- Trade Agreements
- Research and Publication
- Protocol and Conferences
- Current Information
- Communications and Records
- Visa
- Foreign Service Administration
- Foreign Service Personnel

Bureaus:

- Translating
- Accounts

Offices:

- Arms and Munitions Control
- Consular Commercial
- Coördination and Review
- Foreign Service Buildings<sup>1</sup>

- Board of Examiners for the Foreign Service
- Foreign Service Officers' Training School

<sup>1</sup>For detailed statement of the duties of the various officers, divisions, and bureaus, see G. H. Stuart, *American Diplomatic and Consular Practice*, Chaps. V, VI.



As already pointed out, the department of state, the diplomatic service, and the consular service are parts of an integral system. Nevertheless, these parts have frequently appeared to be too much separated and disjointed to permit efficient coöperation. An attempt to remedy this condition by bringing about a closer connection between the State Department and the higher ranks of the diplomatic service was made through the creation, as already noted, of the office of resident diplomatic officer in the department. A similar attempt to bring about a closer connection between the department and the lower grades of the diplomatic and consular services was made through the enactment by Congress in 1915 of a law providing that all appointments to the positions of secretary and consul should be to grades and not to posts, and that any such officer might be assigned to duty in the Department of State without loss of grade or salary for a period of not more than three or four years.<sup>1</sup>

In spite of the considerable improvement which has recently been brought about in the organization of the State Department, it still remains true that both personnel, housing, and appropriations are scarcely adequate. Although the Secretary of State is usually considered the leading man in the cabinet, his salary is no greater than that received by the other members of the cabinet and is quite insufficient, in view of his living expenses and the social duties incumbent upon him. He must maintain social contacts with the highly paid foreign diplomatic representatives in Washington. This involves the expense of entertainments and social functions. These were on a less elaborate scale than usual during Mr. Bryan's Secretaryship, yet even he found it necessary to eke out his income by appearing on the lecture platform. For this he was subjected to criticism which should rather have been directed at Congress for failing to provide adequate support. Congress seems not

<sup>1</sup> Act of February 5, 1915, Chap. 23.

to realize that the position of Secretary of State differs from that of the other members of the cabinet in the expenses attached thereto and that, consequently, the salary should either be increased or should be supplemented by an adequate expense allowance. The World War greatly increased the work and responsibilities of the State Department and accentuated the inadequacy of its personnel and financial support. Neither Congress nor the country has begun to realize the great importance of the work of the department and the need that it should be adequately supported.

In 1926 the total expenditures for both the State Department and the foreign service was a little under ten million dollars. Of this amount about eight and one-half millions were derived from passport and other fees, so that the cost to the taxpayers of the country was only about one and a half millions. When it is considered that in the same year the appropriation for the War and Navy Departments was in the neighborhood of six hundred and seventy-five million dollars, it may be realized how pitifully small is the appropriation for the State Department. An efficient State Department may save the Government in expense much more than its cost, so that increased financial support for it may be consistently favored by the most pronounced devotee of strict governmental economy. A department which has been called our first line of defense, and rightly so, should unquestionably receive more adequate financial support.

Not only is the Secretary of State underpaid, but the same is true generally of the personnel of the department from the under-secretary down to the lowest clerk. The salaries of the clerks are too small to attract men of such quality as to be suitable for promotion to the higher executive positions, with the result that the latter have to be brought in from the outside. Although there have been some notable exceptions (as in the case of Mr. A. A. Adee,

who held the position of second assistant secretary of state for thirty-eight years), the under-secretary of state and the assistant secretaries have usually been political appointees. Since the under-secretary succeeds to the position of Secretary in case of the latter's absence, there is perhaps some reason why he should be a political appointee, but the four assistant secretaries, as well as all other officials in the department, should be permanent appointees, chosen without regard to partisan-political qualifications.

Since the passage of the Rogers Act in 1924, the highest grade foreign service men receive larger salaries than any officers in the department except the Secretary himself. Thus it may result that the under-secretary, assistant secretaries and chiefs of division receive smaller salaries than the foreign service men whom they direct. The Secretary of State, being hard pressed to induce suitable men to accept responsible executive positions in the department, has adopted the practice in a number of instances of transferring foreign service men to the department, who bring with them their foreign service salaries. From this circumstance it may result that a chief of division or other official in the department may be receiving only half the salary of another official doing the same class of work while, on the other hand, a chief of division may be receiving a higher salary than superior officers in the department.<sup>1</sup> There is obviously a need of a general revision of the salary scale in the department in the light of the character of the work involved in the various positions.

#### THE WORK OF THE DEPARTMENT

The work of the State Department is largely concerned with the supervision of the activities of its field force, the diplomatic and consular branches of the foreign service. Nevertheless, many important functions are performed di-

<sup>1</sup>H. K. Norton, "Cracker-Barrel Diplomacy," *World's Work*, 660-666 (October, 1927).

rectly by the department itself. Thus, the Secretary of State maintains constant contact with the representatives of foreign powers in Washington, exchanging communications with them on official matters. As former Secretary of State Charles E. Hughes has aptly said, it should always be remembered that the department which deals with our foreign affairs is the department of peace.<sup>1</sup> Many international controversies which might possibly lead to war are settled by negotiations conducted by the department. Such negotiations may result in the signing of treaties of arbitration and friendship, such as the arbitration treaties of 1908 and 1909 and the Bryan "cooling-off" treaties of 1914. These treaties were bilateral instruments. Multilateral treaties may also be signed as the result of the holding of an international conference, such as the Washington Conference of 1921 on the limitation of armaments, at which four-power and nine-power treaties were signed. This conference was presided over by the Secretary of State and its executive management was in charge of the State Department.

Although the outbreak of the World War greatly increased the work and responsibilities of the State Department, the conclusion of peace brought no decrease of its onerous duties. Even during the progress of the war the department was busy collecting data which would be needed in connection with the peace negotiations. With the restoration of peace, the stream of American tourists began to flow to Europe in greatly augmented numbers. This involved the issuance by the State Department of a large number of passports each year, reaching in 1926 about 190,000. In general, the greatly increased interests and contacts of the United States in world affairs as the result of the World War and our rapidly swelling foreign trade have tremendously expanded the work of the State Department.

The State Department cannot efficiently perform its func-

<sup>1</sup> *Am. Jour. of Internat. Law*, XVI, 356.

tions entirely to itself, but must coöperate with the other principal executive departments as well as receive their coöperation. Thus, the State and Navy or War Departments may coöperate with each other in warlike demonstrations or activities which may have a bearing on our foreign policy, such as the landing of marines in some disturbed Central American republic. Again, the State and Commerce Departments coöperate with each other in the promotion of American foreign trade. The Department of Commerce maintains in Washington a Bureau of Foreign and Domestic Commerce, to which the State Department sends consular reports on the subject of American trade opportunities. Commercial attachés, maintained by the Department of Commerce in foreign countries, are included in the embassy and legation staffs, and this fact enables them to coöperate more effectively with the latter in the preparation of reports on economic matters. There is, however, a certain amount of overlapping and duplication of work between the State and Commerce Departments, both at home and abroad. The Bureau of Foreign and Domestic Commerce at home and commercial attachés abroad are engaged in the performance of the same set of functions as are the consular service and the State Department in its commercial activities, and this involves the possibility, at least, of inter-departmental friction.

#### LEGAL FUNCTIONS

A considerable amount of the work carried on by the State Department is of a legal character and involves a knowledge both of international and of municipal law. "The foreign policy of the United States must be in accordance with the laws of the United States, and as international law is an integral part of our jurisprudence (*Paquette Habana*, 1899, 175 U. S., 677), it follows that the foreign policy of the United States, in so far as it involves a question of

law, rather than courtesy and comity, must be based on international law.”<sup>1</sup> Many of the Secretaries of State have themselves been able lawyers. The amount of legal work in the department, however, especially in connection with the examination of claims, early became such that in 1848 a clerk was specially assigned to this work, and in 1866 the office of examiner of claims was created. There was some feeling, however, that the presence in the State Department of a law officer, advising the Secretary in matters affecting our foreign relations, carried with it the possibility of a lack of harmony between such advice and that given to the President and his cabinet by the attorney-general.<sup>2</sup> Consequently, in the act of Congress which, in 1870, established the Department of Justice, the attempt was made to prevent possible conflict in legal advice relating to foreign affairs by transferring the examiner of claims to the Department of Justice, although his duties remained a part of the functions of the State Department. In 1887, however, Francis Wharton declared that “the law bureau of the department of state is entirely severed in practice and by its duties from the department of justice, nor has its head at any time been subject to the directions of the attorney-general.” In 1891 the title of the examiner of claims was changed to “solicitor for the department of state,” which is still employed. There are also usually several assistant solicitors and a number of law clerks. Among the legal questions coming before the solicitor and his assistants are those pertaining to diplomatic claims, international extradition, citizenship and expatriation, extraterritoriality, neutrality, belligerency, contraband, asylum, international arbitrations, and the distribution of awards made by commissions. These matters involve many difficult and intricate questions in the fields of constitutional law, admiralty law, and criminal law, as well as all branches of international law.

<sup>1</sup> *Am. Jour. Internat. Law*, III, 943 (Oct., 1919).

<sup>2</sup> Learned, *The President's Cabinet*, 189.

In spite of the complexity of the solicitor's duties and the wide legal knowledge which he is expected to have, his salary is quite moderate and is no greater than that received by the solicitors in the other principal executive departments, such as commerce and agriculture.

#### RELATIONS WITH CONGRESS

The relations between the State Department and Congress are not as close as they would be under a parliamentary form of government. But they might be closer than they are, even under our Presidential form. The Secretary of State has no seat in Congress, although one might be accorded to him or to some other representative of the State Department without violating the Constitution. If this were done, many questions which come up in Congress regarding the conduct of our foreign relations could be expeditiously answered without the necessity of resorting to present round-about methods. If a treaty is under discussion in the Senate, the Secretary or his representative could discuss and defend it on the floor. It is not suggested, however, that the Secretary should be responsible in a parliamentary sense to Congress. In this connection may be mentioned the remark of former Secretary of State Charles E. Hughes that the frequent conferences of the President and the Secretary or the under-secretary with the representatives of the press "is our substitute for parliamentary interpellation."<sup>1</sup>

Congress may call upon the Secretary for correspondence or other information relating to the work of his department. Such requests are usually made through the President as the real head of the department, and the information is usually furnished if not incompatible with the public interests. The Secretary, furthermore, may appear upon invitation and make statements before committees of

<sup>1</sup> *Am. Jour. of Internat. Law*, XVI, 368.

Congress. It is obviously wise for him to keep in close touch with the Senate Committee on Foreign Relations, especially in connection with the negotiation of treaties. Harmonious relations between Congress and the State Department will usually prevail if the party of the administration also controls Congress. It will greatly help if the Secretary of State has previously been a member of the national legislature.

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## CHAPTER XVI

### THE DIPLOMATIC SERVICE

**I**T is a matter of international comity and custom, as well as a practical necessity, that each nation should send diplomatic envoys to other nations with which it has important and friendly relations. This implies reciprocal rights and duties on the part of the members of the family of nations to send and to receive such envoys. This does not mean, however, that objection may not be made to the particular individual chosen to represent diplomatically a foreign nation. It is not necessary, moreover, that each nation should send a separate representative to every other with which it maintains diplomatic relations. For example, the ambassador of the United States to Belgium is also accredited as minister to Luxemburg. The United States maintained, in 1927, diplomatic relations with fifty-four countries.

### GRADES OF DIPLOMATIC OFFICERS

The diplomatic service is regulated in part by domestic or municipal law and in part by international law or usage. By the municipal law, the diplomatic service of the United States is a branch of its foreign service, of which the consular service is the other branch, but by international usage the diplomatic service is accorded a more distinct status. In accordance with international usage, American diplomatic representatives are classified according to grades, as follows:

1. Ambassadors extraordinary and plenipotentiary.
2. Envoys extraordinary and ministers plenipotentiary.

3. Ministers resident.

4. *Chargés d'affaires*.

These four grades are the principal diplomatic officers who act as the head of the mission. Various subordinate officers are usually found in their staffs, such as secretaries and counselors of embassy or legation, and certain attachés including military, naval, and commercial. Special commissioners, envoys, or agents with diplomatic powers are also sometimes appointed.<sup>1</sup>

Of the four grades of principal diplomatic officers mentioned above, the first three are accredited by the President to the head of the foreign state or government. The *chargés d'affaires*, on the other hand, are accredited by the Secretary of State to the minister of foreign affairs and have no right to be received by the head of the state. They are not usually sent as regular diplomatic representatives, but merely act as temporary heads of the mission in certain contingencies. Thus, during the absence of the ambassador or minister or during the interval between the resignation of one and the arrival of another, the secretary of embassy or legation may act as *chargé d'affaires ad interim*.

Ambassadors and ministers differ from each other principally in the amount of salary they receive and in the fact that in ceremonial matters they take precedence in the order named. According to the salary schedule as provided in 1937, ambassadors received \$17,500 per annum, while envoys extraordinary and ministers plenipotentiary received \$10,000 except in the case of our minister to the Netherlands, who was paid \$12,000. In that year we maintained diplomatic representatives of the grade of ambassador at the capitals of seventeen countries, *viz*, Argentina, Belgium, Brazil, Great Britain, Chile, China, Cuba, France, Germany, Italy, Japan, Mexico, Peru, Poland, Russia, Spain

<sup>1</sup>The term diplomatic officer is "deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, *chargés d'affaires*, agents, counselors and secretaries of legation, and none others." Revised Statutes, sect. 1674.

and Turkey. To all other countries with which we maintained diplomatic relations we sent envoys extraordinary and ministers plenipotentiary except in case of Iraq to which we sent a minister resident with the super-added designation of consul-general. We also maintained a diplomatic agent and consul-general in Morocco.

Although the Constitution of the United States authorizes the sending of ambassadors, this was not done during the first century of our national existence, because it was not deemed to be in accordance with the simplicity of our democratic traditions. Under the usages of European diplomacy, the ambassador was regarded as the personal representative of the sovereign. On account of rules of precedence among diplomats which were in vogue in foreign courts, our representatives were sometimes inconvenienced and their usefulness interfered with by our failure to conform to the usage of the other great powers in sending ambassadors to important countries. Since ambassadors always took precedence over ministers, not only in such relatively unimportant respects as seating at table, but also in such weightier matters as securing interviews or audiences with the head of the state or minister of foreign affairs, it sometimes happened that our ministers were compelled to cool their heels in ante-rooms while waiting for representatives of lesser states to conclude their interviews. They might even have to suffer the indignity of having their own interviews with the foreign minister interrupted by the inopportune arrival of such a representative. This was one of the reasons why, in 1893, we began to follow the practice of other nations in sending a certain of the more important countries diplomats of the highest grade.

On what basis is the distinction made between the countries to which we send ambassadors and those to which we send representatives of lower grade? Some of the countries to which we send ambassadors are second-rate, or even

third-rate, powers and of much less weight in world affairs than some others to which we send mere ministers. Although there is a certain amount of arbitrariness in their selection, it is nevertheless felt that the countries to which we send ambassadors are, on the whole, more important than the others as far as their relations to the United States are concerned. In spite of this fact, there is a possibility that the countries to which we send mere ministers may resent the insinuation of inferiority implied in such action to the detriment of our friendly relations with them. It may be argued that we should recognize the legal equality of all nations by sending to all of them representatives of equal grade. This, however, would not only increase the expense of our foreign service (which, in itself, is a small matter), but is a question that may be more appropriately dealt with by general international agreement than by the sole action of the United States. The present practice, moreover, recognizes the fact of the existing situation, which is that the relations of the United States with certain countries are much more important than with others.

#### DIPLOMATIC DRESS

Since, as already pointed out, the ambassador was regarded as the personal representative of the sovereign, he therefore assumed, among European countries, a pomp and splendor in his dress, bearing, and retinue which were deemed to savor too much of monarchical traditions to suit the diplomatic representatives of the United States. Benjamin Franklin, the earliest and one of the ablest of American diplomats, was noted for the simplicity of his dress. Unfortunately, not all American diplomats have been endowed with Franklin's ability and intellect which commanded universal respect without regard to the pretentiousness of dress. In 1817, it is recorded, American ministers had a prescribed court dress which consisted of

“a blue coat lined with white silk; a straight cape, embroidered with gold, and single breasted; buttons plain, or, if they could be had, with the artillerist’s eagle stamped upon them; cuffs embroidered in the same manner as the cape; white cashmere breeches; gold knee-buckles; white silk stockings, and gold or gilt shoe-buckles; a three-cornered chapeau bras, not so large as that used by the French nor so small as that used by the English; a black cockade with an eagle attached, and a sword. On gala-days and other occasions of extraordinary ceremony the American ministers were allowed to wear more embroidery, as well as a white ostrich feather, not standing erect, but sewed around the brim, in their hats.”<sup>1</sup>

With the growth of democratic feeling, however, such dress was deemed too gaudy and, in 1853, Secretary of State Marcy instructed American ministers, as far as they could without impairing their usefulness to appear at court “in the simple dress of an American citizen.”<sup>2</sup>

Literal compliance with this instruction was not always practicable. Ministers who carried it out were sometimes embarrassed at evening functions by finding that their costumes rendered them indistinguishable from waiters or other servants. Such inconveniences led to a departure from the strictness of democratic simplicity and the donning of more elaborate costumes. Walter Hines Page, ambassador during the Wilson Administration at the Court of St. James, relates that

“at a levee, the King receives only gentlemen. Here they come in all kinds of uniforms. If you are not entitled to wear a uniform, you have a dark suit, knee breeches and a funny little tin sword. I’m going to adopt the knee breeches part of it for good when I go home—golf breeches in the day time and knee breeches at night. You’ve no idea how nice and comfortable they are—though it is a devil of a lot of trouble to put ’em on. Of course every sort of man here but the Americans wears some sort of decorations

<sup>1</sup>J. B. Moore, *Principles of American Diplomacy* (New York, 1918), 429.

<sup>2</sup>*Ibid.*, 430.

around his neck or on his stomach, at these functions. For my part, I like it . . . here. The women sparkle with diamonds, the men strut.”<sup>1</sup>

One may surmise that perhaps our genial ambassador liked it too well there. Nevertheless, with the growth of wealth, leisure, and worldly-mindedness in the United States, we no longer look askance upon such a picture. After all, democracy no longer need fear monarchy so much as it needs to fear its own inefficiency. Consequently, if it increases the usefulness of our diplomats for them to don the trappings usually associated with royalty, we should not be greatly perturbed.

#### THE SELECTION AND COMPENSATION OF DIPLOMATS

The power of selecting the diplomatic representatives of the United States is placed by the Constitution in the hands of the President and Senate. No legal qualifications are laid down, and civil service regulations are not applied to the selection of ambassadors and ministers, so that the President has complete discretion in making nominations. It is deemed advisable that these officers should be not only in political harmony with the administration in power but also personally acceptable to the President. Consequently, in practice there is usually an almost complete change of the principal officers in the diplomatic service not only when there is a change of party control over the Government but also with each change in the Presidency. In case, however, a Vice-President succeeds to the Presidency on the death of the President, he usually retains in office, for the time being at least, the diplomatic officers appointed by his predecessor. Nevertheless, with but few exceptions, the longest tenure that an ambassador or minister can confidently expect is four years.

<sup>1</sup>B. J. Hendrick, *The Life and Letters of Walter H. Page* (New York, 1922), Vol. I, p. 157.

In the matter of length of tenure our diplomatic service contrasts strikingly with the services of the leading European powers. In England, France, and Germany the service is regarded as a career. A young man may enter the lower grades and after twenty to forty years may reach the topmost rung in the ladder—the position of ambassador to a first-class power. Political and family connections doubtless have some weight in securing promotions, but efficient service is the main factor. At any given time, therefore, the diplomatic services of the leading European powers are likely to be more experienced and efficient than is that of the United States, at least in the ordinary conduct of the diplomatic office.

At the time of the outbreak of the World War in 1914 a new administration had been in power in the United States for a period of a little more than a year. In accordance with custom, there had been the usual wholesale changes in the service. A difficult situation had to be dealt with by a corps of men inexperienced in diplomacy. Of the principal diplomatic officers appointed by this administration to the ten most important posts, only one had had, prior to his appointment, any diplomatic experience whatever. On the other hand, the representatives of Great Britain and France at the same posts had had previous diplomatic experience ranging from ten to thirty-nine years.<sup>1</sup> This instance is mentioned, not as exceptional, but as typical of a situation that may be found at almost any time. Nor must too much blame be attached to the President and Secretary of State, who would be almost more than human if they were able to resist the enormous pressure brought to bear upon them by influential applicants for positions in the service, backed by senators and representatives in Congress. Men who have made large contributions to the campaign fund of the successful party may

<sup>1</sup> National Civil Service Reform League, *Report on the Foreign Service* (New York, 1919), 47-48.



expect to be rewarded by diplomatic appointments. "Lame-ducks" who have done yeoman service for the party in Congress, but whose value to the country their constituents fail longer to appreciate, may demand to be taken care of in a similar way. Secretary John Hay once declared that "all other branches of the civil service are so rigidly provided for that the foreign service is like the topmost rock which you sometimes see in old pictures of the Deluge. The pressure for a place in it is almost indescribable."<sup>1</sup>

Conditions have undoubtedly improved since John Hay's day, especially in the lower grades of the foreign service, but even in the case of ambassadors and ministers, it must not be supposed that they are as a general rule men of the spoilsman type. We frequently find among them men who have won not only wealth but also honor and respect by the ability which they have displayed in some profession or line of work, such as journalism, law, or business. The application of such ability to the great problems and emergencies which sometimes arise in the diplomatic service usually affords gratifying results which could hardly be equalled by lesser men with more specialized diplomatic training and experience. For this reason the success of our diplomatic service has been greater than might be supposed in view of the method of recruiting its members. Of course this method is subject to abuse and sometimes mere politicians are appointed, with little credit to the country.

Within recent years there has been noticeable a tendency to appoint "career-men" to diplomatic posts, that is, men who have had previous experience either in the State Department or in the foreign service. In 1927 the diplomatic representatives of the United States to Argentina, Turkey, Canada, Belgium, Switzerland, Ireland, Greece, and China were career-men. Although, in exceptional cases, such appointments may not be satisfactory, it is a tendency which

<sup>1</sup> W. R. Thayer, *The Life and Letters of John Hay* (Boston, 1915), II, 193.

on the whole augurs well for the service and should be extended. Hitherto career-men appointed to the diplomatic service have, for the most part, been appointed to ministerial rather than to ambassadorial positions. As a rule, the ambassadorships to the more important countries are still given to non-career men. This may be due, in part, to the fact that career-men cannot usually afford to assume the financial responsibilities involved in the acceptance of an ambassadorial position.

There has for decades been much justifiable criticism of the small compensation received by American diplomatic representatives. The salaries paid them do not as a rule come anywhere near meeting their expenses. This is in striking contrast to the generous treatment accorded their envoys by the other principal governments—England, France, and Germany.<sup>1</sup> It is, of course, not desirable that our diplomatic representatives should undertake lavish expenditures for mere purposes of ostentation or display. But even with rigid economy and the cultivation of democratic simplicity the expenses of such an ambassadorship as that at London or Paris amount to several times the official salary. Our former ambassador to London, Walter Hines Page, in a letter to President Wilson dated June 5, 1914, thus graphically describes the circumstances necessitating such expenditures:

“Looked at from the United States, it seems preposterous that an American ambassador in London must have from \$45,000 to \$50,000 a year properly to do his task . . . Ambassadors are given precedence over all but royal persons, and this preëminence carries very costly obligations. Everybody in official and in social life offers him entertainment and some of these entertainments must, of course, be returned. I have returned perhaps one in five—not more. This is necessary, if for no other reason, to prevent hinder-

<sup>1</sup>See comparative table in National Civil Service Reform League, *Report on the Foreign Service* (New York, 1919), p. 33.

ing criticism. Every Thursday afternoon, from 100 to 250 people call, besides large numbers on other days. These callers are persons in official life, the ruling class in English society, and Americans. A record of them must be kept and calls must be returned. Then there are invitations to dinner, to luncheon, to country houses, palace functions; and every member of the diplomatic corps accepts them in the regular pursuit of his business. In addition to all these, the American ambassador is asked sooner or later to all the cities where the lord mayors and council entertain him. All these cost. Not a day passes but I am making speeches or taking journeys, short or long, by rail or by motor, trying to interpret our institutions and our life. All these activities are essential, being part and parcel of the better understanding of the two peoples, and warp and woof of our international friendliness. There is no other way to give expression to these close relations.

"Then there are thousands of Americans who come here. Presently, for example, the training ships from Annapolis will come to the coast. The commanding officer will call on me. I must go to his ship in return. We must exchange dinners, I inviting certain English admirals to meet him. We may dispense with these things in the United States. If we omitted them here, we should start unfriendly gossip throughout Europe. Again, on any nation's natal day, the London ambassador opens his house to his compatriots. A few hundred call on the other ambassadors. On the Americans, from three to four thousand call. I have to hire a hotel. I have thought of omitting it, but everybody warns me not to do so. There surely would be a howl if I did. The ambassador is the visible symbol of the United States to these folk."

Since, in order to meet the necessary and legitimate expenses of the position, an American ambassador must reach down into his own pocket to the extent of many thousands of dollars annually, only men of large independent means can afford to accept the position. Not only is this unfair to the man, but it is not creditable to our government that such a condition is allowed to exist. Regarding this situation President Taft said in 1910:

"We boast ourselves a democratic country. We say that there is no place within the gift of the people to which we may not select the most humble inhabitant, providing he be fit to discharge its duty, and yet we have an arrangement which makes it absolutely impossible for anyone but a millionaire to occupy the highest diplomatic post. Now I ask you whether that is consistency; whether it is not the purest kind of demagoguery. By demagoguery I mean the advancement of an argument which seems to be in favor of democracy but which, when it actually works out, is in favor of plutocracy."<sup>1</sup>

#### THE HOUSING OF DIPLOMATS

One reason why the salaries of American diplomats have been woefully insufficient has been the necessity under which they have labored of paying out of their own pockets the rent of the embassy or legation buildings. Thus, for many years our ambassador in London had to pay at least \$15,000 a year as rent for a furnished residence, while, on the other hand the British Government supplies its representative in Washington with a well-furnished residence.<sup>2</sup> In the letter to President Wilson, quoted above, Ambassador Walter Hines Page laments that

"here in the principal capital of Europe, while France, Germany, Austria, Italy, Spain, Japan all have proper homes, costing each from \$250,000 to \$500,000, we have . . . nothing . . . Not an ambassador in London (excepting the Turk, who doesn't count) gets off with \$50,000 if his house rent were reckoned in. We had as well say, then, that the American Ambassador here—necessarily the most costly of all the diplomatic posts—so long as he has to pay his house rent and all his official entertainment bills, must have at least \$50,000, if he do his task creditably . . . Merely as a diplomatic asset, a good house here would be worth to us a thousand times what it would cost."

<sup>1</sup> *Report on the Foreign Service*, cited above, 32.

<sup>2</sup> American Government Buildings and Embassy, Legation, and Consular Buildings in Foreign Countries, Hearings before the Committee on Foreign Affairs, House of Representatives, 69th Cong., 1st sess. (Washington, 1926), 18.

The lack of a permanent official residence owned by the Government into which our diplomatic representative may move immediately upon his arrival is a great inconvenience to him. In some cases he may be able to secure the residence occupied by his predecessor, but he cannot depend on this. He may not feel that he can afford to pay the rent asked for it, or the owner may refuse to renew the lease, or it may be sold to another government. Even if he obtains it, he may have to furnish it from top to bottom. At all events, his attention is distracted by domiciliary matters at a time when it is quite important that he should devote himself assiduously to making those official contacts which will enable him to represent effectively the interests of his Government. The lack of a permanent, government-owned embassy or legation, therefore, not only is a personal inconvenience to the envoy himself but also interferes with the efficient performance of his official duties.

The lack of a permanent location for the embassy or legation may also be an inconvenience for persons desiring to do business with the diplomatic representative, especially in cases where the offices or chancery are maintained in the diplomat's residence. In the larger capitals, however, it has been customary for the United States Government to rent offices in the business section of town where it would not be suitable to locate the residence of the ambassador or minister. For this purpose a total rental of half a million dollars annually has been paid, an amount which, if capitalized at four per cent, would enable our Government to purchase suitable offices and stop paying rent. In some capitals, where we have maintained several agencies, such as the embassy, consulate-general, customs service, passport and visa offices, and military, naval, and commercial attachés, their offices have not always been concentrated in one building but widely scattered over the city, with resulting loss of efficiency and increase of expense.

Although Congress and the public generally have been

slow in realizing the drawbacks of the situation thus described, a beginning has been made towards improving it. By the Lowden Act of 1911 and by special appropriations Congress has made some provision for embassy and legation buildings. An embassy building in London has been acquired by gift from Mr. J. P. Morgan, although it required a large expenditure by our Government to put it in shape for the purpose. In various ways, by 1926, the United States had acquired embassy or legation buildings or sites in sixteen foreign capitals, as follows: Rio de Janeiro, Santiago, Peking, San José, Havana, Prague, Paris, London, Tokyo, Mexico City, Tangier, Oslo, Panama, San Salvador, Bangkok, and Constantinople.<sup>1</sup> Finally, by the Porter Act, or Foreign Service Buildings Act, of May 7, 1926, Congress embarked upon a more systematic building program. This act authorized an appropriation of \$10,000,000 to be made and expended over a period of five years. To administer this fund it created the Foreign Service Buildings Commission, composed of the Secretary of State, the Secretary of the Treasury, the Secretary of Commerce, and two members of Congress. This act has been called a corollary of the Rogers Act of 1924. The earlier act undertook to some extent to break down the sharp line of distinction between the diplomatic and consular service, while the later act has as one of its purposes the "consolidating, to the extent deemed advisable by the commission, within one or more buildings, the embassies, legations, consulates, and other agencies of the United States Government" maintained in foreign capitals.<sup>2</sup> Although the provisions of this act will not be sufficient to acquire all the buildings needed, it marks an important step in advance, and will be of great assistance in placing our foreign service on a more independent and dignified basis.

<sup>1</sup> American Government Buildings and Embassy, Legation, and Consular Buildings in Foreign Countries, Hearings before the Committee on Foreign Affairs, House of Representatives, 69th Cong., 1st sess. (Washington, 1926), 18.

<sup>2</sup> U. S. Statutes at Large, Vol. 44, Part 2, p. 403.

## SENDING AND RECEIVING DIPLOMATS

A newly-appointed diplomatic representative of the United States is expected, as a rule, to proceed to Washington where, for a period not exceeding thirty days (during which his salary runs) he receives his instructions and familiarizes himself with the duties and responsibilities of his new position. He consults with the officials in the State Department and examines the correspondence on file there regarding unsettled questions pending between the United States and the government to which he has been accredited. It is also well for him to make the acquaintance of the diplomatic representative of that government in Washington. Before leaving Washington he receives and takes with him certain official papers or documents. These are, in addition to his instructions (which are for his private information), his credentials or letter of credence and his passports. His letter of credence is signed by the President and addressed to the head of the foreign government. In case he is going not as a regular diplomatic representative but on a special mission, such as a delegate to an international conference, he takes with him a document known as his "full powers," which gives evidence of his authority to act as representative of his Government for that special purpose. Delegates to a conference are not accredited to the government of the country in which the conference is held, and their full powers are not delivered to the minister for foreign affairs of that country, but are exchanged among themselves.<sup>1</sup>

Upon arrival at his post, the diplomatic representative gets in touch with the minister for foreign affairs to whom he presents a copy of his credentials and arranges through

<sup>1</sup> When President Wilson went as a delegate to the conference of Paris in 1919, he carried neither full powers nor a passport. He was nevertheless admitted to the Conference, as has been the custom in the case of a head of state attending such gatherings, in his own proper person.

him for an audience with the head of the state. At this audience the diplomatic representative delivers to the head of the state the sealed copy of his credentials and exchanges with him formal and complimentary remarks touching on the friendly relations between the two countries. The envoy is expected to furnish the minister for foreign affairs with a copy of the remarks which he intends to deliver on this occasion, in order that a suitable reply may be framed in advance. It should be noted that in the case of a *chargé d'affaires* no audience with the head of the state is granted, and his dealings are solely with the minister for foreign affairs.

Although a nation is practically required, at the risk of seeming unfriendly, to receive a diplomatic representative from every other sovereign nation with which it is at peace, it is, as indicated above, under no such compulsion to receive any particular individual as such representative. In other words it may refuse to receive a certain individual who is sent or whom it is proposed to send on the ground of personal inacceptability. Such an individual is said to be *persona non grata* to the foreign government, which effectually precludes his usefulness as the representative of his government. Therefore, his government should not insist upon his being received when the foreign government evinces a disinclination to do so, even though it does not formally refuse to receive him.

It is a general rule that a nation will not receive one of its own citizens as a diplomatic representative from a foreign government. The reason for this is obviously that his duties as a citizen and as such representative may be incompatible. The United States, however, may receive one of its own citizens as a special agent to negotiate a treaty. This, for example, was done in 1868 when Mr. Anson Burlingame, an American citizen, acted on behalf of the Chinese government in negotiating a treaty between it and the United States.



When a diplomatic representative becomes *persona non grata* on account of actions which result from instructions from his government, the friendly relations between the two governments may be jeopardized. In most cases, however, merely the individual himself becomes obnoxious for personal reasons and friendly relations between the governments are preserved. A number of cases have occurred, the details of which it is unnecessary to recite here, both in which a foreign diplomatic representative to the United States has become *persona non grata* and also in which a representative of the United States sent, or about to be sent, abroad has been declared to be personally unacceptable by the government to which he was to be sent. Until 1893, the United States did not in any case inquire before making a diplomatic appointment as to whether the proposed appointee would be acceptable to the government to which he was to be sent. This failure on our part to adhere to the practice of European governments led to some embarrassing situations, as in the Keiley case in 1885. Since 1893, the United States has adopted the practice of making inquiries beforehand, at least in the case of ambassadors. When an informal inquiry is made and our Government is informed that the individual proposed is personally unacceptable, it has no right to insist upon his being received, even though no reasons for refusal to receive are assigned or the reasons assigned are inadmissible by us. We may, however, show our displeasure by leaving the mission in the hands of a *chargé d'affaires* for a time, as we did in the case of the mission to Austria-Hungary, which, in 1885, declined to receive Mr. Keiley.

#### THE FUNCTIONS OF DIPLOMATS

Sir Henry Wotton once facetiously defined an ambassador as "an honest man, sent to lie abroad for the good of his country." Without adopting a holier-than-thou atti-

tude, it may still be safely averred that this definition does not faithfully describe the typical diplomatic representative of the United States. Such a definition would hardly be consistent with the Golden Rule, which John Hay once declared to be one of the cardinal principles of American foreign policy. Nor is it consistent with President Washington's wish that "the characteristics of an American minister should be marked on the one hand by a firmness against improper compliances, and on the other by sincerity, candor, truth, and prudence, and by a horror of finesse and chicane."<sup>1</sup>

It has sometimes been supposed that the diplomatic service has been rendered less necessary than formerly on account of the great advances in modern means of communication through the telegraph, the electric cable, the wireless or radio, and the transatlantic telephone. These instrumentalities undoubtedly do give a larger measure of control over diplomatic negotiations to the Secretary of State or minister for foreign affairs than he would otherwise have. But there are many matters constantly arising that can be more satisfactorily handled by personal conference than by written communications. Not only formal personal conferences but informal conversations at social functions or otherwise may often elicit important information or points of view. It is sometimes said that half the business of a diplomat consists in cultivating the social graces and making himself agreeable. There is still the need of a man on the spot who can put in the right word at the opportune moment. For these reasons, the diplomat is still indispensable and is not likely to be superseded by any extension or development of means of communication.

A diplomatic representative of the United States is required to reside at the capital of the country to which he is accredited, but he is accorded leave of absence to the

<sup>1</sup> *Am. State Papers, For. Rels.*, 497, quoted by J. W. Foster, *The Practice of Diplomacy*, 104.

extent of sixty days in any one year. This is especially useful in capitals where the climate is bad at certain seasons of the year, resulting in a wholesale exodus of those officials with whom the envoy is supposed to keep in touch.

It is the duty of a diplomatic representative to be a careful observer of conditions abroad and to keep his government informed of all developments, political or economic, which may affect its interests or those of its citizens. He should be especially assiduous in reporting promptly to his government any events or conditions arising at his post which might lead to controversy with his own country. In short, it may be said that he acts as his government's eyes and ears abroad.

Again, he acts as the mouthpiece of his government in transmitting official communications to the government to which he is accredited. Although many matters arising in the relations between the two countries can be more satisfactorily dealt with informally and orally, more serious matters frequently arise that can be better handled through written communications or notes. A diplomat with the requisite ability does not act as a mere errand boy or transmitting agent of his government. His judgment as to the proper tone and content of the note should be very valuable to his government. In making representations about official matters, a diplomat should be careful to communicate only with that officer who is regularly authorized to receive them, that is, with the minister for foreign affairs. In the United States it is considered a breach of diplomatic etiquette for a foreign ambassador or minister to communicate on official matters with any other officer of the Government than the Secretary of State, or with the public generally through the newspapers or magazines. In exceptional cases, however, with the knowledge and consent of the Secretary of State, this may be done.

A diplomatic representative must be careful not to interfere in the public or political affairs of the country where

he resides. He should not discuss political issues or controversies in public speeches, in communications to the newspapers, nor in letters to private citizens. It was a failure to observe this rule which led to the dismissal in 1888 of Lord Sackville-West, British minister to the United States. In 1895 Mr. Bayard, our ambassador in London made speeches of a political nature, which led to a movement in our House of Representatives for a resolution of censure.

Other things which American diplomatic representatives are forbidden to do are, without special instructions, to act as agents for the collection of private claims, and, without the consent of Congress, to accept any present, emolument, office, or title from a foreign government. The acceptance of such favors might, perhaps unconsciously, influence our representative to act less energetically than he should in behalf of American interests. Even without any formal acceptance of office, titles or other favors, some diplomatic representatives of the United States have unfortunately succumbed to the social blandishments of foreign capitals to the detriment of their full usefulness to their country. Others have seemed to lose touch with the currents of public opinion in the United States. For these reasons, Jefferson and others have asserted that the period of service abroad of diplomatic representatives should be limited to a few years, so that they may become or remain Americanized.

One of the most important duties of a diplomat is the protection of the person and property of his fellow-citizens. A citizen of the United States who resides or travels abroad must submit to the valid laws of the country where he happens to be. But if he is subjected to unjust or illegal discrimination or injury, either by local officials or by private individuals, he has a right to appeal to the diplomatic representative of the United States in that country for protection. It then becomes the duty of our envoy to make repre-

sentations to the proper officials in order that the injury may be as far as possible redressed. The United States has sometimes been accused of not being especially solicitous about the protection of its naturalized citizens from injury in the country of their former citizenship. This is really less true of the United States than of other governments. This is a more serious problem with the United States, however, because it has more naturalized citizens than any other country. The United States has found it advisable to refuse protection to its naturalized citizens against the performance of duties to the country of their former citizenship when it appears that they acquired American citizenship merely for the purpose of avoiding the performance of such duties.

American diplomatic representatives sometimes exercise their good offices for the protection of the nationals of third states, in the absence of direct diplomatic representation by such states. This function can be assumed by a diplomat only with the approval of his own government and with the consent of the government to which he is accredited. A situation calling for such activity is likely to arise when diplomatic relations between belligerent states are broken off at the outbreak of war. For example, when the European War began in 1914 the diplomatic representatives of the United States in several European capitals looked out for the interests of the nationals of certain of the belligerent powers.

Although it is primarily the duty of consuls to promote the international trade of the United States, diplomatic representatives also frequently are able to serve effectively in this direction. Sometimes the task of relieving our commerce from discriminatory burdens requires representations to the central government, which can of course be better made by the diplomat than by the consul. The diplomat coöperates with the consul in various ways for the promotion of commerce, and the giving of a place on the

diplomat's staff or official entourage to commercial attachés assists them in their work.

The above account by no means gives a complete list of the functions of diplomatic representatives. There are many miscellaneous duties, such as arranging presentations at court for socially ambitious Americans and securing for them cards of admission to various gatherings, which are constantly arising. In the following passage Walter Hines Page, our former ambassador to the Court of St. James, gives in his inimitable style a graphic account of these miscellaneous duties:

“If you think it's all play, you fool yourself. I mean this job. There's no end of the work. It consists of these parts: Receiving people for two hours every day, some on some sort of business, some merely ‘to pay respects;’ attending to a large (and exceedingly miscellaneous) mail; going to the Foreign Office on all sorts of errands; looking up the oddest assortment of information that you ever heard of; making reports to Washington on all sorts of things; then the so-called social duties—giving dinners, receptions, etc., and attending them. I hear the most important news I get at so-called social functions. Then the court functions; and the meetings and speeches! The American Ambassador must go all over England and explain every American thing. You'd never recover from the shock if you could hear me speaking about Education, Agriculture, the observance of Christmas, the Navy, the Anglo-Saxon, Mexico, the Monroe Doctrine, Co-education, Woman Suffrage, Medicine, Law, Radio-Activity, Flying, the Supreme Court, the President as a Man of Letters, Hookworm, the Negro—just get down the Encyclopaedia and continue the list. I've done this every week-end for a month, hand running, with a few afternoon performances thrown in! I have missed only one engagement in these seven months; and that was merely a private luncheon. I have been late only once. I have the best chauffeur in the world—he deserves credit for much of that. Of course, I don't get time to read a book. In fact, I can't keep up with what goes on at home. To read a newspaper eight or ten days old, when they come

in bundles of three or four—is impossible. What isn't telegraphed here, I miss; and that means I miss most things.

"I forgot, there are a dozen other kinds of activities, such as American marriages, which they always want the Ambassador to attend; getting them out of jail when they are jugged (I have an American woman on my hands now, whose four children come to see me every day); looking after the American insane; helping Americans move the bones of their ancestors; interpreting the income-tax law; receiving medals for Americans; hearing American fiddlers, pianists, players; sitting for American sculptors and photographers; sending telegrams for property owners in Mexico; reading letters from thousands of people who have shares in estates here; writing letters of introduction; getting tickets to the House Gallery; getting seats in the Abbey; going with people to this and that and t'other; getting tickets to the races, the art-galleries, the House of Lords; answering fool questions about the United States put by Englishmen. With a military attaché, a naval attaché, three secretaries, a private secretary, two automobiles, Alice's private secretary, a veterinarian, an immigration agent, consuls everywhere, a dispatch agent, lawyers, doctors, messengers—they keep us all busy. A woman turned up dying the other day. I sent for a big doctor. She got well. As if that wasn't enough, both the woman and the doctor had to come and thank me (fifteen minutes). Then each wrote a letter. Then there are people who are going to have a Fair here; others have a Fair coming on at San Francisco; others at San Diego; secretaries and returning and outgoing diplomats come and go (lunch for 'em all); niggers come up from Liberia; Rhodes Scholars from Oxford; Presidential candidates to succeed Huerta; people who present books; women who wish to go to court; Jews who are excited about Rumania; passports, passports to sign; peace committees about the hundred years of peace; opera singers going to the United States; artists who have painted some American's portrait—don't you see? I haven't said a word about reporters and editors; the city's full of them."<sup>1</sup>

<sup>1</sup> Letter of December 22, 1913, to the Ambassador's brother: B. J. Hendrick, *The Life and Letters of Walter H. Page* (New York, 1922), I, 159-161.

## DIPLOMATIC IMMUNITIES

In order that diplomatic representatives may perform their functions efficiently and without unnecessary interference, they are accorded by international law and usage certain rights, privileges, and immunities. These are sometimes explained as being based on the legal fiction of extraterritoriality. This doctrine, however, must be used with caution and not pushed to its logical conclusions; otherwise it is likely to cause confusion. Such immunities as diplomats enjoy are defined by usage, and since they are fully stated in standard works on international law, it is not necessary to recount them in detail here. These immunities attach to the embassy or legation buildings and grounds as well as to the person of the diplomat himself. They also extend to the members of his suite or staff, such as secretaries and attachés, to the members of his immediate family and possibly also to other persons living under his roof or in his employ. In order that it may be known what persons are entitled to diplomatic immunities or privileges, it is customary for the envoy to hand the minister for foreign affairs a list of the members of his staff or entourage.

In the first place, the baggage and effects of diplomats and members of their suites are not subject to the payment of custom duties nor even to examination when entering the country of their sojourn. For this reason, foreign diplomatic representatives may import intoxicating liquors into the United States in spite of the prohibition amendment to the Constitution. Diplomatic immunities attach to an envoy by courtesy upon his entrance into the country to which he is accredited and even before he has presented his credentials to the proper authorities. Likewise, they continue to attach to him after he has been handed his passports preparatory to his departure from the country



and until he finally leaves, provided he does so without unreasonable delay.

The diplomatic representative enjoys immunity from local police jurisdiction. If he or any member of his suite should violate the law of the country, he cannot rightfully be arrested, tried, or punished. The police have no right to enter the embassy or legation building for the purpose of arresting the perpetrator of a crime, but, on the other hand, the diplomatic envoy has no right to maintain the building as an asylum for harboring criminals. The envoy is exempt from the payment of personal taxes as well as property taxes upon the embassy or legation buildings. He cannot, against his will, be sued for debt, nor compelled to appear before a court or magistrate as a witness and testify. The archives and official papers of the embassy or legation are exempt from seizure.

A diplomatic envoy may voluntarily waive his immunity from civil or criminal process, but only with the consent of his government, because the privilege is regarded as attaching to his office rather than to him personally. It is not to be supposed that diplomatic envoys will use their privileges in order to evade just obligations, nor that they will intentionally or flagrantly violate the law of the land. If this should happen, however, the only remedy consists in recall or dismissal.

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## CHAPTER XVII

### THE REORGANIZED FOREIGN SERVICE

CERTAIN of the defects of our foreign service have been adverted to in preceding chapters, as well as the partial remedies applied. Mention has been made of the act of Congress passed in 1915 providing that all appointments to the positions of secretary and consul should be to grades and not to posts. This made for greater mobility in the service. Mention has also been made of the Porter Act of 1926 which provided for the inauguration of a systematic program of building or purchasing embassy and legation buildings. This was an important step in advance inasmuch as, when the program has been carried out, men of requisite attainments but without large private means will be better able to accept diplomatic appointment. These and other acts and executive orders issued from time to time have tended toward the improvement of the service and towards remedying specific defects. By far the most important and thoroughgoing act for the improvement of the foreign service, however, was the Rogers Act, approved May 24, 1924.<sup>1</sup> The central feature of this act is that it undertakes to break down the hard and fast line of demarkation which had hitherto existed between the diplomatic and consular services. It provides that the diplomatic and consular services shall be known as the foreign service. It creates the title or designation of "foreign service officer," by which are denoted permanent officers in the foreign service below the grade of minister.<sup>2</sup> A

<sup>1</sup> This act was slightly amended by the Moses-Linthicum Act of 1931, the text of which may be found in G. H. Stuart, *American Diplomatic and Consular Practice* (New York, 1936), Appendix C.

<sup>2</sup> The President may still exercise his constitutional power of appointing consuls and secretaries (public ministers), but there are no salaries attaching to these offices. Lay, *Foreign Service of the United States* (New York, 1925), 255.

member of the foreign service thus designated may be assigned to duty in either the diplomatic or consular branch of the foreign service at the discretion of the President. A uniform salary scale is provided, and the act thus brings about interchangeability between the diplomatic and consular services which had not hitherto existed on account of the wide variation in salaries. Mr. John Jacob Rogers, member of Congress and author of the bill, thus graphically describes the situation which the act is designed to remedy:

“Let us imagine that the diplomatic service is a tall perpendicular pole. Near it and of equal height, but in no way connected with it, let us imagine a consular pole. The diplomatic pole has four notches equally spaced from the bottom to the top. These represent the four promotion and salary classes. The consular pole, strangely enough, has about twenty-five notches more or less equally spaced from the bottom to the top. When a man starts climbing either the diplomatic or the consular pole he necessarily sticks to the one task. No matter how much better he could climb the other pole if given the chance, he is, in practice, never allowed to prove this. Once he starts upon his life climb he is never permitted to transfer across to the other pole. What we are proposing in the reorganization bill is very simple. We are making the two poles into a ladder by putting in nine rungs, equally spaced from the bottom to the top. Every man now in either branch of the service and found worthy of retention will be placed opposite one of these nine class and salary rungs. A consul-general of high class or a counsellor of embassy will be placed at the first rung, and on down, in accordance with considerations of ability and seniority. Those newly taken into the foreign service of the United States—which is the name of the ladder we are now creating—will start in at the bottom rung. The rungs serve not only as a convenient basis for classification and for salary scale, but they serve also as a medium by which a man who has been doing diplomatic work can be transferred across for consular work, or vice versa. The ranks of the consular service and of the diplomatic service having been assimilated there can be no confusion. Every man will be an officer in the foreign

service of the United States of a particular class and instantly available for work either on the consular side or on the diplomatic side.”<sup>1</sup>

Under the uniform salary scale provided by the Rogers Act, diplomatic secretaries and consuls alike receive salaries ranging from \$9,000 per year for class one to \$3,000 for class nine, while the salaries of the lower or unclassified service range from \$3,000 to \$1,500. Prior to the passage of this act the highest salary in the consular service was \$12,000 (there being, however, but two persons receiving this amount), while the highest salary in the diplomatic service below the grade of minister was \$4,000. This great disparity in salaries not only prevented interchangeability but it meant that secretaries and counsellors of embassy or legation could be recruited, as a rule, only from the ranks of rich young men. Unfortunately, some of these went into the service for social rather than for business reasons. Some of them were disdainfully described as “the boys with the white spats, the tea drinkers, the cookie pushers.”<sup>2</sup> Undoubtedly, many of them could not be justly so characterized, and it is of course true that the possession of wealth does not imply lack of ability or necessarily disqualify for the satisfactory performance of arduous duties. Nevertheless, the fact that the salary attached to the secretaryship was considerably less than the expenses limited the possible range of available personnel to such an extent as to make those in the service much more independent and little amenable to discipline. This, of course, militated against the efficiency of the service.

The interchangeability between the two branches of the service brought about by the Rogers Act constitutes a rec-

<sup>1</sup> Address before the Williamstown Institute of Politics, August 21, 1923, quoted by Lay, *Foreign Service of the United States*, 257.

<sup>2</sup> By Hon. Hugh Gibson. See Lay, *op. cit.*, 240.

ognition of the fact that their respective tasks are not so dissimilar as their former complete separation would seem to indicate. Many duties of diplomatic secretaries and consular officers, such as the gathering of information and the protection of American interests are similar. Moreover, as has been indicated, the promotion of American international trade is not an exclusive function of the consular service, but the diplomatic branch also concerns itself with this matter. It sometimes happens that a man who has entered the consular service shows decided aptitude for the performance of functions of a distinctively diplomatic character, or vice versa, so that his transfer from one branch of the service to the other would not only give greater scope to his abilities and greater satisfaction to him personally, but would also tend to promote the efficiency of both branches of the service. There is no good reason, therefore, why there should be a hard-and-fast line between the two services. It must be remembered however, that in certain respects the work of consuls and of diplomatic secretaries are quite different, and the Rogers Act, therefore, did not go to the extreme of merging the two branches into one completely unified system. They still remain as distinct branches of the foreign service. In fact, a member of either branch is technically a foreign service officer only for the purpose of drawing his salary and as the "hinge of interchangeability." In respect to the performance of his duties he is either a consul or a diplomatic secretary.<sup>1</sup>

In addition to interchangeability between the two branches of the foreign service, the Rogers Act also provides for the assignment of foreign service officers to duty in the State Department for a period of not more than three, or possibly four, years. This assignment is made without loss of class or salary. Thus, a foreign service officer of class one, assigned to the State Department,

<sup>1</sup> Lay, *op. cit.*, 256.

would continue to draw his salary of \$9,000, although this is larger than any salary regularly paid to any officer in the State Department except the Secretary himself. When, therefore, the Secretary desires to make an appointment to a position in the department, such, for example, as a chief of division, and the regular salary attached thereto is insufficient to attract a man of requisite training and ability, the Secretary may resort to the plan of calling in a foreign service officer to fill the position. In fact, many such appointments have been made. This may lead to certain anomalies in respect to variation of salary for similar work in the department. On the other hand, it may obviate to some extent the anomaly of having men in the field directed and instructed by men in the department drawing smaller salaries. Moreover, it enables the department to secure the benefit of the training and experience acquired by foreign service officers in the field, while at the same time affording the latter a better insight into the working of the department.

The Rogers Act also provides that the Secretary of State may order experienced foreign service officers to the United States during their statutory leaves of absence for duty in the department or for trade conference work and that travel and subsistence expenses of such officers and their immediate families shall be paid out of departmental funds. This is important as enabling foreign service officers, who otherwise might feel that they could not afford the expense of the trip, to keep in better touch with conditions and the trend of opinion in the United States. Although the danger which Jefferson feared that members of the foreign service might become de-Americanized through long sojourns abroad is probably not so great now as in his time, nevertheless the provision for occasional returns of foreign service officers to the United States may be of considerable value from the standpoint both of the officers and of the State Department.

## REPRESENTATION ALLOWANCES

Mention has already been made of the inadequate compensation paid the diplomatic representatives of the United States. This is due not so much to the smallness of the salaries as to the lack of provision for the expenses necessarily entailed by the position. The salaries paid our ambassadors and ministers compare favorably not only with the salaries of other officers of our Government, such as members of the cabinet and the justices of the Supreme Court, but also with the salaries paid the diplomatic representatives of the other principal countries. But other countries provide handsomely for entertainment expenses which our representatives have had to pay out of their own pockets. It is not fair for the nation to expect them to do this, for such expenses are paid out not for personal display or ostentation, but in order adequately and efficiently to perform the duties of the office. Hon. Hugh Gibson, when minister of the United States to Poland, thus described the situation.

"The present system is very much as if we were to say to one of our admirals: 'We are appointing you commander-in-chief of the Atlantic Fleet. You will have a salary appropriated by Congress of \$10,000. You will now make a trip around the world, calling at the ports specified by the Secretary of the Navy, doing such entertaining as may be necessary for the good of the service; you will make necessary purchases of provisions, coal, and other supplies, and fight any battles that may be necessary, but you will pay for it out of your own salary.' Nobody would be surprised if the admiral said he was unable to work on these terms—but that is exactly what the Government expects from diplomatic officers today."<sup>1</sup>

These expenses are not private but public and should be paid by the government. Now that a systematic policy

<sup>1</sup> Quoted by M. Sullivan, in *World's Work*, 50 (Nov., 1925).

of establishing permanent Government-owned embassy and legation buildings has been inaugurated under the Porter Act of 1926, the expense of upkeep and maintenance will become greater and the need for governmental assistance in defraying such expenses will become accentuated. In order to meet this general situation the Rogers Act authorized the President to grant representation allowances to diplomatic missions out of any money which Congress might appropriate for this purpose. The carrying out of this purpose will enable diplomatic representatives to charge the cost of official entertaining and returning official courtesies to their expense accounts, just as do business agents when they entertain prospective customers. It is to be remembered, however, that the provision of the Rogers Act is merely an authorization and not an appropriation, and that specific action by Congress is necessary in order to carry it out. Unfortunately, Congress has been dilatory about making the actual appropriation.

#### PERSONNEL ADMINISTRATION

The Rogers Act provides that "appointments to the position of foreign service officer shall be made after examination and a suitable period of probation in an unclassified grade or, after five years of continuous service in the Department of State, by transfer therefrom." The act thus embodies in law certain provisions for the maintenance of the merit system which had previously rested merely on the Presidential executive orders of 1906 and 1909. Since a foreign service officer holds a statutory position, Congress has undertaken to lay down, in general, the method to be followed in filling it. The details, however, have to be filled in by executive and departmental orders. Such an order is that issued by the President on June 7, 1924, which provides that vacancies in all classes of foreign service officers from one to nine "shall be filled



by promotion from lower classes, based upon ability and efficiency, as shown in the service." It further provides that all admissions or new appointments to the service shall be to the grade of foreign service officer, unclassified. In order to administer the system of examination, instruction, promotion, transfer, demotion, and dismissal of foreign service officers, the order creates three boards with partly overlapping membership. These boards are the Foreign Service Personnel Board, the Board of Examiners, and the Foreign Service School Board. The under-secretary of state, two of the assistant secretaries, and the chairman of the Executive Committee of the Foreign Service Personnel Board are members of all three of these boards.

The duties of the Foreign Service Personnel Board are to keep efficiency records of the foreign service officers and to make recommendations to the Secretary of State regarding the promotion, demotion, or dismissal of such officers as well as their transfer from one branch of the service to the other. The board may recommend that certain foreign service officers be designated as counsellors of embassy or legation or even be promoted to the grade of minister. As has been already indicated, a number of foreign service officers have been promoted to the grade of minister and a few even to the grade of ambassador. Some of the assistant secretaries in the State Department have also been given ministerial appointments. The fact that foreign service officers, through ability and efficiency, may rise to the highest grades of the service tends to promote efficiency in the lower grades and to retain in the service men of ability who might otherwise feel compelled to resign and enter other work where there would be greater chance of promotion. In order to secure legislative coöperation in support of the personnel policy of the board, its chairman is required to invite the chairmen of the senate and house committees dealing with foreign affairs to sit with the

<sup>1</sup> For text of the order, see Appendix IX.

board in considering promotions, demotions, or removals, but without participating in its decisions.

In order to bring about coöperation between the various representatives of the United States in foreign countries and to give unified direction to their activities, a Presidential executive order was issued on April 4, 1924, requiring that "whenever representatives of the department of state and other departments of the Government of the United States are stationed in the same city in a foreign country, they shall meet in conference at least fortnightly." The purpose of such conferences is declared to be "to secure a free interchange of all information bearing upon the promotion and protection of American interests."

Persons without previous experience in either the foreign service or the State Department can be appointed to only the highest or lowest grades of the service, that is, to the position of ambassador or minister or to the position of foreign service officer, unclassified. Persons seeking appointment to the latter position must be American citizens of good character, between twenty-one and thirty-five years of age and must be specially designated by the President for appointment subject to examination. The fitness of those designated by the President is determined through an examination conducted under the supervision of the board of examiners. The regulations governing this examination are substantially the same as those which had been laid down in previous executive orders regarding admission to the consular service.

An important provision of the executive order of June 7, 1924, was that establishing a foreign service school for the instruction of new appointees. The term of instruction covers one year and during this period new appointees are deemed to be on probation. The record they make during this period is the basis upon which recommendations are made for their advancement and assignment to duty or for their dismissal. The chief instructor of the

school is an experienced member of the foreign service. Since the school is for the instruction of persons who have already passed the prescribed examinations and have been appointed to the unclassified grade, its course of study is more advanced and specialized than the subjects upon which the entrance examinations are based. It consists in part of lectures upon specialized and technical aspects of foreign service work and in part of practical observation of the workings of the various divisions of the Department of State. In September, 1925, the school graduated its first class, consisting of sixteen men and one woman.<sup>1</sup>

#### THE RETIREMENT SYSTEM

An important factor in any system of personnel administration is a retirement system. The existence of such a system is a great help in promoting morale and *esprit de corps*. This is especially true in the case of the foreign service, where the expenses attached to the position usually render it difficult, if not impossible, for at least the married members of the service to save enough out of their salaries to provide adequately for old age. Consequently, the Rogers Act provided for a retirement system for members of the foreign service. They are entitled to retirement under the system after reaching the age of sixty-five and after rendering at least fifteen years of service. Upon retirement they receive annuities equal to a certain percentage of their average annual salaries for the preceding ten years, depending upon length of service. In order to pay these annuities, a retirement fund is created through contributions from the members of the foreign service equal to five percent of their salaries, the remainder to be made up by governmental appropriations, subject to the condition that the total appropriations must not exceed the

<sup>1</sup>E. C. Stowell, "The Foreign Service School," *Am. Jour. of Internat. Law*, XIX, 763-8.

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total contributions made by the foreign service officers. In computing the length of service for the purpose of retirement, each year in unhealthful posts in tropical countries is counted as a year and a half.

An important provision of the act is that which protects the retirement benefits of all members of the classified service who may be appointed to positions in the State Department or promoted to the grade of ambassador or minister. If, under these circumstances, the retirement benefits were lost, many members of the classified service would naturally hesitate to accept such promotion.

The retirement system is intended, however, not so much for the benefit of the men in the service as for the building-up of a more stable, permanent, and efficient service. It is of great assistance in inducing able men to remain in the service rather than accept offers from private business concerns at considerably larger salaries. Many members have been lost from the service in this way because they had no assurance of promotion or adequate recognition if they remained in the service. Under the new system they are much more likely to resist outside offers not only because they are assured of a retirement allowance if they remain in the service but also because they know that the retirement of older men above them will provide room for their own promotion to the higher and better paid positions.

From the above account it appears that the Rogers Act, and the executive orders issued thereunder, constitute a great step in advance toward placing our foreign service upon a more efficient basis. It must not be supposed, however, that any miracle has been suddenly wrought. For the most part the men who came into the service under the former régime with its obvious defects are still in the service. In many cases, the only essential change in their status is an increase of salary.

Provision now exists for dismissal from the service for

inefficiency, but this action is not likely to be taken except in flagrant cases. Gradually, however, within the next decade or two, the new system may confidently be expected to bring about a radical improvement in the service.

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## CHAPTER XVIII

### DIPLOMATIC INTERCOURSE: PERSONNEL

UNDER the Articles of Confederation the power of sending and receiving ambassadors was vested in Congress, and the states were prohibited from engaging in diplomatic intercourse without the consent of that body. Strictly construed, the language of the Articles would have enabled Congress to appoint only the highest grade of public minister. In practice such a construction was not adhered to.<sup>1</sup> But this defect was remedied in the present Constitution by including "other public ministers and consuls" among the officers who may be sent abroad by our Government. In regard to the method of appointment the Constitutional Convention of 1787 considered for some time a proposal to vest in the Senate the power to appoint ambassadors and other public ministers. Gouverneur Morris, however, argued against such a mode of appointment. He considered the Senate as "too numerous for the purpose; as subject to cabal; and as devoid of responsibility."<sup>2</sup> In the final draft, the power of appointing ambassadors and other public ministers and consuls was conferred upon the President, "by and with the advice and consent of the Senate," while the power of receiving ambassadors and other public ministers was vested in the President alone.

### CREATION OF DIPLOMATIC OFFICES

Diplomatic offices are created by the Constitution, by international law, or by act of Congress and cannot be created by the President, as this is properly a legislative

<sup>1</sup> Madison, in *Federalist*, No. 42.

<sup>2</sup> Farrand, *Records of the Federal Convention*, II, 389.

power.<sup>1</sup> The power of Congress to create offices arises from the clause of the Constitution enabling that body to pass all laws which may be necessary and proper for carrying into execution the powers of any officer or department of the Government. With reference to the President's power of appointing officers whose appointments were not otherwise provided for in the Constitution, Madison moved in the Convention, on August 24, 1787, to amend by striking out "officers" and inserting "to offices," in order to "obviate doubts that he might appoint officers without a previous creation of the offices by the Legislature;" and the motion was carried.<sup>2</sup> On September 8 Gerry moved that "no officer be appointed but to offices created by the Constitution or by law." But by a close vote this was rejected as being unnecessary.<sup>3</sup> It has been stated that the question whether the President may, on his own initiative, appoint an ambassador, public minister, or consul when Congress has not created those offices, is one which cannot be regarded as settled.<sup>4</sup> It would seem, however, that the provision of the Constitution vesting in the President and Senate the appointment of these officers is sufficient authority to enable them to act, even though Congress has not passed a law specifically creating such offices. This, at any rate, appears to have been the construction placed upon that provision in practice during the early years of the Constitution.

Despite the apparently inconsistent position which he had taken in the Convention, Madison was of the opinion in 1822 that "the practice of the government had, from the beginning, been regulated by the idea that the places or offices of public ministers and consuls existed under the law and usages of nations, and were always open to receive appointments as they might be made by competent authorities."<sup>5</sup>

<sup>1</sup> Willoughby, *Constitutional Law of the United States*, II, 1178.

<sup>2</sup> *Journal* (Hunt ed.), II, 246.

<sup>3</sup> *Ibid.*, II, 335.

<sup>4</sup> *Tucker on the Constitution*, II, 736.

<sup>5</sup> 3 Madison's Works, 267, quoted in Moore, *Digest of Internat. Law*, IV, 451.

Attorney-General Cushing took practically the same position in 1855, declaring it to be the "undeniable fact that 'public ministers' as a class are created by the Constitution and law of nations, not by act of Congress. No act of Congress created the offices of minister to [the various countries], to which ministers were sent by President Washington." <sup>1</sup>

#### APPOINTMENT OF DIPLOMATIC REPRESENTATIVES

In 1789 Congress passed an act creating the department of foreign affairs and providing that the secretary of the department should perform such duties respecting foreign affairs as the President might enjoin on or entrust to him.<sup>2</sup> No act of Congress was passed, however, providing for the maintenance of diplomatic representatives abroad until July 1, 1790, when the President was authorized by law "to draw from the Treasury a sum not exceeding forty thousand dollars annually, for the support of such persons as he shall commission to serve the United States in foreign parts, and for the expense incident to the business in which they are employed."<sup>3</sup> Prior to the passage of this act, however, President Washington had commissioned William Short as *chargé d'affaires* in France and William Carmichael in Spain. "In each of these cases, the designation of the officer was derived from the law of nations, and the authority to appoint from the Constitution."<sup>4</sup> The power to appoint diplomatic agents, declared Attorney-General Cushing in 1855, "is a constitutional function of the President, not derived from, not limitable by, Congress, but requiring only the ultimate concurrence of the Senate; and so

<sup>1</sup> 7 Op. U. S. Att.-Gen., 212.

<sup>2</sup> 1 Stat. at L., 28. Shortly afterwards the name was changed to Department of State.

<sup>3</sup> *Ibid.*, 128.

<sup>4</sup> 7 Op. U. S. Att.-Gen., 194.



t was understood in the early practice of the Government.”<sup>1</sup>

The Constitution does not undertake to enumerate the various grades of diplomatic officers. The term “public ministers,” however, as used in the Constitution, is sufficiently comprehensive to embrace all grades and ranks of diplomatic agents. Our Government adopted, in part, the system of diplomatic grades and ranks which it found in vogue among other civilized nations, and the State Department has reiterated the rules in reference to this matter which were drawn up at the Congresses of Vienna and of Aix-la-Chapelle in 1815 and 1818 respectively.<sup>2</sup> From 1790 to 1818, Congress continued to vote lump sum appropriations for diplomatic intercourse in general acts. That body made no attempt during these years to create diplomatic offices or to determine ranks or grades, although in some of the appropriation acts certain grades of diplomatic agents, e.g., ministers plenipotentiary and *chargés d'affaires* were mentioned. The practice during this time “recognized the right and power of the President to designate, and with the consent of the Senate, appoint, public ministers of any rank or denomination which the public interest might require. . . . Indeed, many of the early appointments are of a title of designation deliberately different from those expressly named in the acts of Congress.”<sup>3</sup> Beginning in 1818, the names of the existing or anticipated diplomatic missions are introduced into the appropriation acts, and certain sums of money are allotted to each; but, in addition, a contingent fund is placed at the disposal of the President.<sup>4</sup>

In 1826 opposition developed in Congress to the proposal of President Adams to send envoys extraordinary and ministers plenipotentiary to the Congress of Panama, on the ground that no such officers were known to the Constitution

<sup>1</sup> 7 Op. U. S. Att.-Gen., 193.

<sup>2</sup> *Instructions to Diplomatic Officers of the United States*, sects. 18-20; Moore, *Digest of Internat. Law*, IV, 430.

<sup>3</sup> 7 Op. U. S. Att.-Gen., 195-6.

<sup>4</sup> 3 Stat. at L., 422.

or to the law of nations. Martin Van Buren proposed a resolution in the Senate declaring that the Constitution authorizes nomination and appointment to offices of a diplomatic character only, existing by virtue of international laws, and does not authorize the appointment of representatives to an assembly of nations.<sup>1</sup> The Senate nevertheless confirmed the appointments, although no such offices had been created by act of Congress; and Congress subsequently sanctioned the proceedings by appropriating the necessary funds for the mission.

Although under the power vested in him by the Constitution the President doubtless might, from the beginning, have appointed diplomatic representatives of the grade of ambassador, none such were appointed prior to 1893. In that year Congress passed an act providing that "whenever the President is advised that any foreign government is or is about to be represented in the United States by an ambassador," etc., "he is authorized, in his discretion, to direct that the representative of the United States to such government shall bear the same designation."<sup>2</sup> In 1909 Congress went farther and provided that "hereafter no new ambassadorship shall be created unless the same shall be provided for by act of Congress."<sup>3</sup> Since the passage of this act, Congress has at various times assumed to authorize the President to appoint ambassadors to various countries, such as Spain, Chile, and Argentina.<sup>4</sup>

These acts, however, are not to be construed as valid limitations upon the power of the President to appoint diplomatic representatives. In 1855 Congress passed an act which purported to require that the President should appoint to certain countries representatives of certain grades. Attorney-General Cushing, however, properly held that this provision must be regarded, not as mandatory, but

<sup>1</sup> Senate Exec. Jour., III, 516 (March 14, 1826).

<sup>2</sup> 27 Stat. at L., 497 (March 1, 1893).

<sup>3</sup> 35 Stat. at L., 672.

<sup>4</sup> 38 Stat. at L., 110, 378.

as merely directory or recommendatory.<sup>1</sup> The same characterization may be made of the acts of 1893 and of 1909, mentioned above. The discretion of the President as to whether it is expedient to maintain a representative of a certain grade at a certain post cannot be legally controlled by Congress, nor can he be required to maintain any representative whatever at a given foreign capital if he thinks it expedient to leave the post vacant. Suppose the Senate rejects the nomination of a person whom the President thinks suitable to be appointed to a diplomatic position. Can Congress compel him to nominate a person who is satisfactory to the Senate rather than leave the place vacant? Or, suppose that the President considers the attitude of a foreign government toward the United States so unfriendly as to justify us in leaving vacant the position of our diplomatic representative accredited to it, or in maintaining at that post a representative of an inferior grade in order to show our displeasure. Can Congress nevertheless compel the President to keep the place filled by the appointment of a representative of a higher grade? These questions are manifestly to be answered in the negative. The President is, however, dependent upon Congress for securing the necessary appropriation to pay to a diplomatic representative a salary commensurate with his grade, and this enables Congress to exercise a practical control over the matter, qualified to some extent, however, by the practice of maintaining a contingent fund at the President's disposal.<sup>2</sup>

The process of appointment to office consists of three steps: (1) nomination, (2) confirmation, *i.e.*, the granting of the "advice and consent" of the Senate to the appoint-

<sup>1</sup> 7 Op. Att.-Gen., 189-229.

<sup>2</sup> There seems to have been at times some opposition in Congress to providing the President with a contingent fund for foreign intercourse. Maclay records in his journal that in 1790 Jefferson, then Secretary of State, appeared before a Senate committee, and, as a result of his illuminating exposition of diplomatic methods in Europe, the committee agreed to strike out the specific sum to be given to any foreign appointment, leaving a lump sum to the President for foreign intercourse. *Journal*, p. 272.

ment, and (3) signing the commission. Chief Justice Marshall held, in *Marbury v. Madison*, that the appointment was complete when the commission was signed and that the delivery of the commission could, in proper cases, be compelled by mandamus.<sup>1</sup> Of the three steps in the process, the President controls the first and third, while the second only devolves upon the Senate. In taking the first and third steps, the action of the President is voluntary. He cannot be legally compelled to sign a commission, even though the Senate has given its advice and consent to the appointment.<sup>2</sup> Some question was raised during the early years under the Constitution as to whether the Senate has the right to participate in the first step by suggesting names to the President. This view, however, did not prevail, since the language of the Constitution which associates the President and Senate in the appointing power clearly implies that the President has the sole right of nomination, and that the advice and consent of the Senate operate only upon the confirmation of the appointment. The President may, however, voluntarily consult with influential members of the Senate in regard to nominations, and the requirement of Senatorial confirmation in order to validate an appointment may exert an indirect or retroactive influence over the President's action.<sup>3</sup>

The question may be raised whether the action of the Senate in rejecting a nomination made by the President is to be regarded as a final and conclusive determination of the matter. In other words, may the President renominate the same person for the same place? In 1834 President Jackson nominated Andrew Stevenson to be minister to Great Britain, but the Senate refused to approve. The President

<sup>1</sup> 1 Cr. 156.

<sup>2</sup> In *Marbury v. Madison*, however, Chief Justice Marshall remarked: "To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution."

<sup>3</sup> A majority vote in the Senate is sufficient to confirm appointments, so that action on nominations to office is, as a rule, more easily secured than on treaties, when a two-thirds vote of the senators present is required.

then allowed the post to remain vacant for almost two years. Finally, in 1836, he again sent in the nomination of Stevenson for the place. With reference to this renomination, Henry Clay, from the Committee on Foreign Relations, made a report recommending the rejection of Stevenson's renomination and stating it to be the opinion of the Committee that the practice of renomination was subject to serious abuses and that when the Senate has once rejected an individual nomination the decision ought to be held as final and conclusive.

"The Senate," continued the report, "is supposed to be, by the theory of the Constitution, as free and independent in the exercise of its judgment on nominations submitted to its consideration as the President is in proposing them. Each of the two components of the appointing power acts upon its own sense of duty and upon its own responsibility. The Senate has no right to require the President to nominate any particular individual, and the President has no right to require the Senate to confirm any particular nomination. When the Senate has once decided upon a nomination, there ought to be an end to the matter."<sup>1</sup>

The Senate could, of course, reject a renomination precisely as any other nomination; or it might fail to act upon it at all, which would have the same result. A settled practice on the part of the Senate to reject renominations would doubtless have the practical effect of deterring the President from making them. But the discretion of the President in making a renomination as often as he pleases cannot be legally controlled, save, of course, by an amendment to the Constitution.

#### QUALIFICATIONS OF DIPLOMATIC OFFICERS

Congress has sometimes attempted to lay down legal qualifications for diplomatic and consular officers. Thus an

<sup>1</sup> Senate doc. 231, 56th Cong., 2nd sess., part 4, p. 33; Senate Exec. Jour., IV, 516 (March 3, 1836). On motion of Clay, the Senate ordered that the nomination of Stevenson be tabled (*Ibid.*, 516).

act of 1855 provided "that the President shall appoint no other than citizens of the United States . . . as envoys extraordinary and ministers plenipotentiary, . . . consuls or commercial agents."<sup>1</sup> Similar provisions requiring that none but American citizens shall be appointed to designated diplomatic and consular offices have been incorporated in subsequent acts of Congress. The requirement of such a qualification constitutes an attempted limitation upon the free exercise of the appointing power, and the question may be raised whether the discretion of the President and Senate may, consistently with the Constitution, be thus circumscribed. Attorney-General Cushing held that such a provision in an act of Congress is recommendatory only, and not mandatory. "The limit of the range of selection," he said, "for the appointment of constitutional officers depends on the Constitution. . . . The President has absolute right to select for appointment."<sup>2</sup>

The same question has come up in connection with the application of the merit system to appointments in the civil service. Certainly Congress could not legally limit the power of the President and Senate to the appointment of such persons only as receive the highest grade in a competitive examination and are so certified by a civil service commission, since this would amount to a transfer of the power of appointment to the commission. The right of Congress to create offices may be construed to imply the right of prescribing qualifications for them, but this right "is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment."<sup>3</sup> The President may, however, by executive regulations, voluntarily limit his nominations to such persons as may pass an examination after being designated by him to take it. It has also been held that the President may, under authority derived from Congress,

<sup>1</sup> Act of March 1, 1855, sect. 9.

<sup>2</sup> 7 Op. Atty.-Gen., 215, 267.

<sup>3</sup> 13 *ibid.*, 520.

issue such regulations even with reference to positions in the civil service which by law are to be filled by appointees of a head of an executive department.<sup>1</sup> By executive orders of 1906 and 1909, such regulations have been issued by the President with reference to certain grades of diplomatic secretaries and consuls.<sup>2</sup> These orders also provided that none but citizens of the United States shall be eligible to take the examinations.

Attorney-General Akerman, in 1871, gave a more liberal construction of the power of Congress in prescribing qualifications for office than had been allowed by Attorney-General Cushing. It was held by the former that Congress could require that officers shall be of American citizenship or of a certain age, and still leave a reasonable scope for the exercise by the appointing power of its own judgment and will.<sup>3</sup> If any limitation upon such scope not found in the Constitution itself is allowed, however, it is difficult to see where the line should be drawn. The better view would seem to be that of Attorney-General Cushing that qualifications, such as age and citizenship, required by acts of Congress are only recommendatory. They should, of course, be treated by the President with the respect due to the opinions of a coördinate branch of the Government, but not as compulsory if, in his judgment, it is inexpedient to observe them. Congress, however, could limit the payment of compensation for their services to such appointees as possess the qualifications prescribed by law. It has, in fact, adopted this course and has stipulated that no compensation provided for diplomatic officers shall be applicable to persons holding such offices who are not citizens of the United States.<sup>4</sup> It is doubtful whether the President could legally provide compensation for such persons from his contingent fund, for, under the general rules of statutory construction,

<sup>1</sup> 13 Op. Atty.-Gen., 524.

<sup>2</sup> Executive Orders of June 27, 1906, and November 26, 1909.

<sup>3</sup> 13 Op. Atty.-Gen., 525.

<sup>4</sup> 11 Stat. at L., 60; R. S., sect. 1744; cf. R. S., sect. 1760.

an express provision that no compensation should be paid to an officer not having the qualifications prescribed by Congress would be construed as an exception to a general grant to the President of a lump sum to be used as a contingent fund.<sup>1</sup>

Another question which may be considered in this connection relates to the power of the President to appoint a member of the Senate or of the House of Representatives to a diplomatic position. With a view to keeping the legislative and executive departments of the Government separate, as well as avoiding such abuses as were thought to have grown up in England through appointment of members of Parliament to office, the framers of our Constitution prohibited a Senator or Representative from holding any office under the United States, or from accepting such an office, if civil in character, during the time for which he was elected, if the office were created or its emoluments increased during such time.<sup>2</sup> In spite of this provision, however, members of Congress have sometimes been nominated to diplomatic positions, although not without some opposition among their colleagues.

The question here involved has come up in two forms: (1) with reference to the appointment of members of Congress to regular or, comparatively speaking, permanent diplomatic positions, and (2) with reference to their appointment on special or temporary missions to accomplish particular objects, such as the negotiation of a treaty of peace. An incident illustrative of the attitude of members of the Senate toward appointments of the first class occurred in connection with the nomination by President Jackson in 1834 of Andrew Stevenson to be our minister to Great Britain. Mr. Stevenson was, at the time of his nomination,

<sup>1</sup> Evasion by the President, however, of Congressional stipulations in this respect, through payments to persons without the prescribed qualifications from the secret fund on Presidential certificates, could probably be disclosed only in impeachment proceedings.

<sup>2</sup> Art. I, sect. 6, cl. 2.



Speaker of the House of Representatives. His nomination was rejected by the Senate, and, in a report subsequently made by Henry Clay from the Committee on Foreign Relations, opposition to his appointment was based, in part, upon his membership in Congress.

"It is a fundamental principle of free governments," declared the report, "that, in order to preserve the purity of their administration, each of the three departments into which, according to all safe maxims, they are divided, should be kept independent of, and without the influence of the other. But, if the head of one of these departments may, at a critical period, confidently present, and for a long period of time hold up to the presiding officer of the popular branch of the other, the powerful inducement of a splendid foreign mission, is there not imminent danger of undue subserviency—of a failure of that presiding officer faithfully and independently to discharge the high duties of his exalted station?"<sup>1</sup>

Although there might be some danger of the abuse to which this report refers, there is no constitutional objection to a member of Congress, after resigning his legislative position, accepting appointment to a regular diplomatic office which has not been created and whose emoluments have not been increased during the time for which he was elected.

In the second place, the question has been raised as to the legality, or at least the propriety, of a member of Congress, without resigning from that body, accepting appointment on a special diplomatic mission, such as one deputed to negotiate a treaty of peace. On the commission to negotiate the Treaty of Ghent in 1814, President Madison appointed, with the advice and consent of the Senate, James A. Bayard, a member of the Senate, and Henry Clay, at that time Speaker of the House. Both men, however, evidently considered their new duties incompatible with mem-

<sup>1</sup> Senate doc. 231, 56th Cong., 2nd sess., part 4, p. 32; Senate Exec. Jour., IV, 515 (March 3, 1836).

bership in Congress, because they resigned from that body. On the commission to negotiate the treaty of peace with Spain in 1898 President McKinley appointed three members of the Senate, one being president *pro tem.* of that body and another being chairman of the Committee on Foreign Relations. Their names were not submitted to the Senate for confirmation, nor did they resign from that body. The President appointed them, however, during a recess of the Senate, and the negotiations were practically completed during this interim.

The President's appointment of members of the Senate to conduct negotiations led to the introduction in the upper house of a resolution and a bill expressing disapproval of the practice. In order not to cast reflection upon the particular senators appointed by the President, the resolution and bill were not reported by the Committee on the Judiciary, to which they were referred. But Senator Hoar, chairman of the committee, was instructed to confer with the President and to protest against the practice. At the interview the President gave a qualified assurance that the practice would be discontinued.<sup>1</sup> In 1898 the Senate declined to confirm the appointment of three of its members as members of the Hawaiian Commission. Nevertheless, the three served on the commission as mere Presidential appointees.<sup>2</sup> The question arose again in 1903 upon a proposed amendment to the Sundry Civil Appropriation Bill providing that senators and representatives should be ineligible for service on foreign missions. The amendment failed to pass, but the debate upon it in the Senate indicated that the opinion of that body was strongly opposed to the service of senators on such missions, especially when they were appointed to negotiate treaties which must later come before the Senate for action, since it might give the President an undue influence over the Senate.

<sup>1</sup> Cong. Record, February 26, 1903, vol. 36, p. 2698.

<sup>2</sup> *Ibid.*, 2695. The members of the Senate who served on this commission received no compensation beyond their salaries as senators.

The argument of unconstitutionality was also brought forward in this debate against the practice in question. Senator Bacon declared that it was "distinctly in opposition to the express policy, if not the express command, of the Constitution." At the same time, however, he indicated the basis upon which the practice may be defended against this charge: "The only possible escape from the [constitutional] prohibition is to say that a position on one of those commissions is not an office."<sup>1</sup> The persons designated by the President to serve on special missions to negotiate treaties need not be considered officers of the United States. The power of the President to appoint commissioners to negotiate treaties rests, not upon his power to appoint officers, but upon his power to negotiate treaties. The President merely employs agents to perform certain specific duties under his direction. Such persons receive no fixed compensation authorized by law, but are paid, if at all, out of the contingent fund placed at the disposal of the President. Although the President may voluntarily send their nominations to the Senate, this is not done as a rule, and the constitutional requirement as to the confirmation by the Senate of Presidential appointments is not applicable.

#### PRESIDENTIAL APPOINTMENT WITHOUT SENATORIAL CONFIRMATION

Under the Constitution, Congress is empowered to vest the appointment of "inferior" officers in the President alone or in the heads of departments. In pursuance of this power Congress has vested the appointment of certain persons in the lower grades of the consular service, such as vice-consuls, consular clerks, and student interpreters, in the President alone or in the Secretary of State.<sup>2</sup> The power to appoint these inferior officers; however, is of minor significance. A more important power is that which

<sup>1</sup> Cong. Record, February 26, 1903, vol. 36, p. 2696.

<sup>2</sup> Revised Statutes, sect. 1704; 24 Op. U. S. Atty.-Gen., 52.

the President has developed of appointing special diplomatic agents without the confirmation of the Senate. Such Presidential agents may, in general, be divided into (1) those designated to negotiate a treaty and (2) those designated for other purposes connected with the general conduct of our foreign relations.<sup>1</sup>

During the first quarter-century of our history under the Constitution the President repeatedly sent to the Senate for confirmation the names of persons nominated by him to negotiate treaties. There were several instances during this period, however, in which the President appointed special agents for this purpose without Senatorial confirmation. Thus on October 13, 1789, President Washington sent Gouverneur Morris to Great Britain as a private agent to negotiate a treaty of commerce, and on March 2, 1793, he commissioned David Humphreys to negotiate with Algiers. Since 1815 the instances in which the President has sent to the Senate the names of persons designated to negotiate treaties have been exceptional. An investigation of this subject was made in 1888, and the results were published in the minority report of the Senate Committee on Foreign Relations relative to the proposed fisheries treaty with Great Britain. According to this compilation, 473 persons were employed by the United States in conducting negotiations from 1789 to 1888. Of these thirty-two were appointed by the President with the advice and consent of the Senate, three were appointed by the Secretary of State, and 438 were appointed by the President alone.<sup>2</sup> Between 1888 and 1891, the names of treaty commissioners were submitted to the Senate in three instances. But since the latter date,

<sup>1</sup>For lists of cases of Presidential appointments without Senatorial confirmation, see Moore, *Digest of Internat. Law*, IV, 452-457; Foster, *Practice of Diplomacy*, 198-203; and Wriston, "Presidential Special Agents in Diplomacy," *Am. Pol. Sci. Rev.*, X, 481-499 (Aug., 1916).

<sup>2</sup>Senate doc. 231, 56th Cong., 2nd sess., part 8, pp. 337-362. Between 1827 and 1880 no names of treaty negotiators were sent to the Senate. *Ibid.*, p. 333. It should be noted, however, that some of the 438 cases in which persons were appointed by the President alone were recess appointments which the Senate subsequently confirmed.

there have been no cases of the sort.<sup>1</sup> With reference to such appointments, the minority report mentioned says:

“The constitutional power of the President to select the agents through whom he will conduct such business is not affected by the fact that the Senate is or is not in session at the time of such appointment or while the negotiation is being conducted, or the fact that he may prefer to withhold, even from the Senate, or from other countries, the fact that he is treating with a particular power or on a special subject. The secret-service fund that Congress votes to the Department of State annually is that from which such agents are usually paid. That is the most important reason for such appropriations.”<sup>2</sup>

As illustrative of the practice of the President in sending special agents without Senatorial confirmation, a few instances may be specifically mentioned. In 1817 President Monroe sent three commissioners to the rebelling Spanish-American colonies to inquire into conditions with a view to recognition of their independence. The names were not sent to the Senate, although that body was in session when the commissioners sailed. In this case it would not have been appropriate to appoint regular diplomatic representatives, since there was no independent government to which they could be accredited. A special item in the diplomatic appropriation bill was inserted for the salaries and expenses of the commissioners; but, on objection made by Henry Clay on the ground that the appointees had not been confirmed by the Senate, it was stricken out, and provision was made for their compensation out of the contingent fund under the head of incidental expenses.

In 1847 President Polk ordered Nicholas Trist to Mexico on a secret mission to negotiate a treaty of peace, should he find the conditions favorable. Trist was also given extraor-

<sup>1</sup>House rept. 387, 66th Cong., 1st sess., part 2, p. 5, in which it is pointed out that in only thirty-five instances has the President sent the names of treaty negotiators to the Senate, while in between 500 and 600 instances he has made the appointment without the advice and consent of the Senate.

<sup>2</sup>Sen. doc. 231, VIII, 333.

dinary powers with reference to the direction of military and naval operations. Although recalled, he persisted in negotiating the Treaty of Guadeloupe Hidalgo, which was subsequently ratified.

It may, of course, and frequently does, happen that general diplomatic or treaty negotiations are conducted, not by mere Presidential agents, but by the Secretary of State or by the regular diplomatic representatives of the United States at foreign capitals, whose appointments have been confirmed by the Senate. In the case of the Secretary of State, however, the Senate, by custom, usually confirms without question whomsoever the President may nominate to that office, while the action of the Senate upon the nominations both of the Secretary and of the regular diplomatic representatives is usually taken without regard to, or even without knowledge of, any particular negotiations which they may be called upon to conduct in the course of their duties. It sometimes happens, however, in the case of important or delicate negotiations, that the President prefers to entrust them to specially selected agents rather than to the regular diplomatic representatives. Thus in 1901, while the Senate was in session, President McKinley, without confirmation by that body, commissioned W. W. Rockhill as plenipotentiary to negotiate a treaty for the settlement of the Boxer troubles. The best known instance of this sort, however, occurred in 1893, when J. H. Blount was appointed by President Cleveland, without Senatorial confirmation, as a special commissioner to the Hawaiian Islands with powers which, in all matters affecting the relations of the United States to the islands, were declared in his instructions to be "paramount" to those of the regular minister. This unusual procedure aroused criticism in the Senate, and a minority of the foreign relations committee of that body denounced it as unconstitutional.<sup>1</sup> It was also declared by an outside observer that, "if the President may appoint a

<sup>1</sup>Senate doc. 231, 56th Cong., 2nd sess., part 6, p. 395.

diplomatic agent with paramount power, the office of the Senate in the appointing power is superfluous."<sup>1</sup> The President's action, however, was upheld by the majority report of the Senate committee, as follows:

"A question has been made as to the right of the President to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions without dissent on the part of Congress or the people of the United States. The employment of such agencies is a necessary part of the proper exercise of the diplomatic power which is entrusted by the Constitution with the President. Without such authority our foreign relations would be so embarrassed with difficulties that it would be impossible to conduct them with safety or success. These precedents also show that the Senate, though in session, need not be consulted as to the appointment of such agents, or as to the instructions which the President may give them."<sup>2</sup>

The majority of the committee thus upheld the practice of the President in this respect not only on the ground of precedent, but also on the basis of necessity. The argument from necessity is also potent where, as sometimes happens, the President deems secrecy in negotiations indispensable to their success.<sup>3</sup> The practice has also been upheld on the ground that it is implied in the President's initiative in foreign affairs and also in Congressional appropriation acts.<sup>4</sup> The President very largely controls the means of conducting treaty and other negotiations, and there would seem to be no constitutional limitation to prevent him from

<sup>1</sup> F. N. Thorpe, "Can the President Appoint Paramount Diplomatic Agents Without the Consent of the Senate?" *Am. Law Register*, N. S., XXXIII, 262. See also, *ibid.*, 177 ff.

<sup>2</sup> Senate doc. 231, 56th Cong., 2nd sess., part 6, p. 387.

<sup>3</sup> Cf. remarks of James Buchanan, in Cong. Globe, IX, 473, quoted by Wriston, *Am. Pol. Sci. Rev.*, X, 487.

<sup>4</sup> Wriston, *loc. cit.*, 488-488.

negotiating a treaty in person. When the President thus acts in person, it is not a case of self-appointment, but rather the performance of the constitutional function directly instead of through agents.<sup>1</sup>

Some express Congressional authority may perhaps be found for the appointment of Presidential agents. Thus, by act of March 3, 1897, Congress authorized the President, whenever he should determine that the United States ought to be represented at an international conference on bimetallism, to appoint five or more commissioners to such conference and appropriated a lump sum for the compensation and expenses of such commissioners. Congress may, of course, vest the appointment of inferior officers in the President alone, but the commissioners provided for by this act could hardly be classed as inferior officers, since their positions were lacking in the characteristics of an office, which have been described as embracing the ideas of "tenure, duration, emolument and duties." It was rather a transient or occasional employment.<sup>2</sup>

Congressional authority for the appointment of Presidential agents, however, is usually found in occasional acts providing special or additional compensation for such

<sup>1</sup>Cf. the following remarks of Senator Spooner in his debate in the Senate in 1906 with Senator Bacon: "He [the President] may employ such agencies as he chooses to negotiate the proposed treaty. He may employ the ambassador, if there be one, or a minister or a *chargé d'affaires*, or he may use a person in private life who he thinks by his skill or knowledge of the language or people of the country with which he is to deal is best fitted to negotiate the treaty. He may issue to the agent chosen by him—and neither Congress nor the Senate has any concern as to whom he chooses—such instructions as seem to him wise. He may vary them from day to day. That is his concern. The Senate has no right to demand that he shall unfold to the world or to it, even in executive session, his instructions or the project or progress of the negotiation. I said 'right.' I use that word advisedly in order to illustrate what all men who have studied the subject are willing to concede—that under the Constitution, the absolute power of negotiation is in the President and the means of negotiation subject wholly to his will and judgment." Quoted in Corwin, *President's Control of Foreign Relations*, 171-2.

<sup>2</sup>See *U. S. v. Hartwell*, 6 Wall., 385, 393, quoted by Willoughby, *Constitutional Law of the U. S.*, 528, and the opinion of the attorney-general that a delegate to the International Conference of American States is not an officer of the United States. 23 Op. Atty-Gen., 533, quoted by Moore, *Digest of Internat. Law*, IV, 440. Cf. also *U. S. v. Germaine*, 99 U. S., 508, 512 and *U. S. v. Mouat*, 124 U. S., 303.



agents and more especially by implication in a series of acts beginning with that of July 1, 1790, providing a contingent fund for foreign intercourse at the disposal of the President, and in a provision of those acts now incorporated in the Revised Statutes allowing payments to be made from such contingent fund on Presidential receipts or certificates without vouchers specifically accounting for such expenditure.<sup>1</sup>

Although Congressional authority thus exists, at least by implication, for the appointment of Presidential special agents, nevertheless that practice has not escaped occasional opposition from Congress and from the Senate. In 1882, the President negotiated a treaty with Corea through a naval officer as his special agent.<sup>2</sup> In advising and consenting to the ratification of the treaty, the Senate attached a reservation to the effect that it did not thereby

“admit or acquiesce in any right or constitutional power in the President to authorize or empower any person to negotiate treaties or carry on diplomatic negotiations with any foreign power, unless such person shall have been appointed for such purpose or clothed with such power by and

<sup>1</sup>R. S., sect. 291. This provision is as follows: “Whenever any sum of money has been or shall be issued from the Treasury, for the purposes of foreign intercourse or treaty with foreign nations in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the proper accounting officers of the Treasury, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.” This provision thus enables the President to maintain a secret service fund, without specifically accounting for expenditures therefrom.

A request made by the House of Representatives through House resolution of Apr. 9, 1846, calling upon the President for information in regard to expenditures on Presidential certificates made by his predecessors was refused by President Polk. See his message in Richardson, *Mess. and Pap. of the Presidents*, IV, 431-6; E. C. Mason, “Congressional Demands upon the Executive for Information,” *Papers of Am. Hist. Assoc.*, V, 370; and Hinds, *Precedents*, II, 1026. In 1911, President Taft issued an executive order forbidding the Secretary of State or any other officer or employee in the State Department to give information concerning moneys expended and accounted for by certificate, except upon direction of the President. Order No. 1382, July 7, 1911. Cf. the President’s executive order No. 1062 of Apr. 14, 1909, cited above, p. 19.

<sup>2</sup>Paullin, *Diplomatic Negotiations of American Naval Officers*, 320.

with the advice and consent of the Senate, except by the Secretary of State or diplomatic officer appointed by the President to fill a vacancy during the recess of the Senate."<sup>1</sup>

The question may be raised whether Congress could curb the practice of the President in appointing special diplomatic agents by passing an act requiring that such agents or delegates should be appointed by and with the advice and consent of the Senate. In 1919 an amendment was adopted to a House bill authorizing the President to call an international telegraphic conference and to appoint delegates thereto, requiring that such appointments should be made by and with the advice and consent of the Senate.<sup>2</sup> With reference to this amendment, reports were made from the House Committee on Foreign Affairs. The majority report defended the amendment, on the ground that one of the purposes of the conference was to draft a treaty and that there were precedents for the Senate's confirmation of treaty negotiators.<sup>3</sup> It is true, as we have seen, that the President has sometimes sent the names of treaty negotiators to the Senate for confirmation. When he has done so, there has usually been political harmony between him and the upper house. In this way he may virtually consult the other branch of the treaty-making body in advance. In confirming the nominations the Senate practically authorizes the commencement of negotiations, and, although not thereby committing itself to the approval of the results, it is likely to look with a more favorable eye upon the project of a treaty framed by negotiators in whose appointment it has had some share. As was pointed out in the minority report of the committee, however, the cases in which the President has voluntarily sent the names of treaty negotiators or

<sup>1</sup> Malloy, *Treaties*, etc., I, 340. A Senate resolution of similar import was tabled in 1834. Sen. Exec. Jour., IV, 413, 445.

<sup>2</sup> Cong. Record, October 22, 1919, vol. 58, p. 7348. The amendment was carried in the House by a vote of 161 to 125.

<sup>3</sup> House rept. 387, 66th Cong., 1st sess.

other special agents to the Senate for confirmation do not constitute a precedent for an act of Congress requiring him to do so.<sup>1</sup> If Congress by act constitutes the position of a delegate to an international conference an office under the United States and attaches thereto a definite salary, it can doubtless require the President to submit nominations to the Senate. But it is difficult to see how compliance with the act could be compelled by any means short of impeachment, so long as the delegate is paid from the contingent fund on Presidential certificates, or is willing to serve without compensation. Such an act would be indicative of the opinion of Congress and entitled to respect, but it would not necessarily be mandatory upon the President. Whatever treaty should be negotiated by the President's appointees would have to be submitted to the Senate for its advice and consent, so that the rights of that body would ordinarily be sufficiently safeguarded. Congress might, however, provide that no compensation should be paid out of the public funds to delegates to an international conference unless the Senate has advised and consented to their appointment, and this would probably have controlling effect as to the compensation of such delegates, even though a contingent fund for the general purpose of foreign intercourse should at the same time be provided.<sup>2</sup>

A reaction against what was considered to be an undue use by President Wilson of special agents in conducting our foreign relations was indicated by the language of one of the proposed reservations to the Treaty of Versailles adopted by the Senate in November, 1919, providing that no person should represent the United States in the assembly or council of the League of Nations unless Congress should have provided for his appointment and defined

<sup>1</sup> House rept. 387, 56th Cong., 1st sess., part 2, p. 4.

<sup>2</sup> By an act of 1810 Congress provided that no *chargé d'affaires* nor secretary of embassy or legation should be entitled to compensation unless appointed by the President, by and with the advice and consent of the Senate. 2 Stat. at L., 608; R. S., sect. 1684.

his powers and duties. The reservation also provided that no citizen of the United States should be appointed as a member of the various commissions or other bodies under the treaty except with the approval of the Senate. Whatever practical justification there may have been for this proposed reservation, it manifestly ran counter to the Constitution in several respects. It undertook to place, through the treaty-making process, a limitation upon the constitutional power of Congress to provide for the appointment of inferior officers by the President alone. Such an attempted limitation could not, however, be legally binding upon Congress. The proposed reservation was also unconstitutional in so far as it purported to place a restriction upon the President's power to fill vacancies during the recess of the Senate.<sup>1</sup> Although the regular and permanent representatives of the United States on such a body as the assembly or council of the League of Nations would doubtless fall within the category of officers, and their appointments would therefore require Senatorial approval unless designated by Congress as inferior officers, it might be appropriate, in some cases, for the President to employ special agents temporarily on some of the subordinate commissions or other bodies to be created under the treaty. The objections to the proposed reservation were evidently, to some extent, recognized by the Senators in charge, since it was subsequently modified so as to eliminate the requirement regarding Senatorial approval.<sup>2</sup>

The appointment by the President of special diplomatic agents is doubtless to some extent an anomalous practice, and one scarcely authorized by the theory of the Constitution. It may be used by the President as a means of safeguarding his initiative in foreign relations from invasion by the Senate, and it may be justified in certain cases,

<sup>1</sup>Speech of Senator Walsh of Montana, Cong. Record, Nov. 15, 1919, vol. 58, p. 9053; Q. Wright, "Validity of the Proposed Reservations to the Peace Treaty," *Columbia Law Review*, 138 (February, 1920).

<sup>2</sup>Cong. Record, March 19, 1920, p. 4899.

especially where the international situation admittedly requires prompt and secret action.<sup>1</sup> But if used to excess it may properly be objected to as a virtual evasion of the Constitution and as tending toward personal and autocratic government.

#### RECESS APPOINTMENTS

Foreign relations should be carried on with as little interruption as possible through accidental or unforeseen changes in the personnel of the diplomatic force. Consequently, inasmuch as neither Congress nor the Senate is continuously in session, provision is made in the Constitution for the President to fill "vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."<sup>2</sup> By virtue of this power the President has frequently made appointments to diplomatic positions by granting temporary commissions during the recess of the Senate. An ambassador or minister of the United States accredited to a foreign government may, for various reasons, vacate his office at any time. In such a case the President may appoint the secretary of embassy or legation as *chargé d'affaires ad interim*, and, if the Senate is not in session, grant him a temporary commission. The "full power" given by the President to a commissioner to negotiate a treaty is given

<sup>1</sup>Special diplomatic agents were employed to a notable extent during President Wilson's administrations. This was doubtless due in part to the unusually disturbed condition of international relations during this period. Several special Presidential agents were sent to Mexico during the time when it was the policy of our Government not to recognize the *de jure* character of the government of that country, and when, therefore, it would not have been feasible to send regular diplomatic officers. On May 12, 1917, the State Department announced the membership of a special diplomatic mission to Russia, including Mr. Elihu Root, bearing the title of ambassador extraordinary, and six ministers plenipotentiary, together with two ministers representing the army and navy. In this case, as in the other instances of special missions, there was no Congressional nor Senatorial authority, and the project was carried out on the authority of the President alone.

<sup>2</sup>Art. II, sect. 2, cl. 3.

specially in each particular case and may be conferred upon the resident minister as well as upon a special commissioner. If the President appoints an envoy to a foreign government with the particular object of negotiating a treaty, and sends his name to the Senate for confirmation, as President Washington did in 1794 when he appointed John Jay to negotiate a treaty with Great Britain, the Senate, in advising and consenting to the appointment, virtually gives its consent in advance to the opening of negotiations. If the Senate declines to confirm the appointment because it is opposed to the making of such a treaty, the President may, during the recess of the Senate, appoint an envoy for the purpose by granting him a temporary commission. Under the Constitution, this commission expires at the end of the next session. By that time, however, even though the Senate fails to confirm the appointment, the treaty negotiations may have been completed.

When President Madison, in 1813, appointed three commissioners to negotiate a treaty of peace with Great Britain, under the mediation of Russia, the Senate was not in session. Subsequently, the question was raised in that body as to whether the President had the power to make such appointments under the constitutional provision relating to the filling of vacancies that may happen during a recess. It was argued that no vacancy can happen in an office not previously full.<sup>1</sup> This narrow construction, however, has not prevailed. Attorney-General Wirt declared, in 1823, that the term, "may happen," is equivalent to "may happen to exist," and that without such interpretation, the constitutional provision could not be executed in its spirit, reason, and purpose.<sup>2</sup> Attorney-General Cushing declared in 1855 that this question was obsolete and that

<sup>1</sup> Resolutions of Senator Gore, March 7, 1814, Benton's *Abridgment of Debates*, V, 85.

<sup>2</sup> 1 Op. U. S. Atty.-Gen., 631. Cf. the opinion of Attorney-General Taney, 2 *ibid.*, 525. See also 12 *ibid.*, 32; 19 *ibid.*, 261.

there was no doubt that the President might appoint a diplomatic representative, during the recess of the Senate, "in a perfectly new case."<sup>1</sup>

[For References, see p. 461.]

<sup>1</sup>7 Op. U. S. Atty.-Gen., 212.

## CHAPTER XIX

### DIPLOMATIC INTERCOURSE: PROCEDURE

**O**THER aspects of diplomatic intercourse which require consideration are participation in international conferences and the removal of, instructions to, and reception of diplomatic representatives.

#### PARTICIPATION IN INTERNATIONAL CONFERENCES

On account of our traditional policy of avoiding foreign entanglements, and because of the absorption of our energies in the development of a comparatively new country, the United States has been somewhat wary about taking part in international conferences. The initiative in the calling of an international conference, or in arranging for the participation of the United States therein, has usually been taken by the President, though sometimes at the suggestion of Congress. In a special message to the Senate, December, 1825, President J. Q. Adams informed that body of an invitation which the United States had received to participate in a conference to be held at Panama the following year. He also informed the Senate that he had accepted this invitation, which act he deemed to be within his constitutional competence; but he added that he desired, before going further with the project, to secure the support of the Senate in advising and consenting to the appointment of envoys to the conference, as well as of Congress in passing the necessary appropriations.<sup>1</sup> The proposal aroused considerable opposition. The Senate Committee

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, II, 318.



on Foreign Relations made a report opposing the project and declaring that the committee had been embarrassed by the fact, as stated in the President's message, that he had already accepted the invitation.<sup>1</sup> After much debate, however, the Senate finally confirmed the nominations of the envoys to the conference and Congress appropriated the necessary funds.<sup>2</sup>

Congress has sometimes undertaken to authorize the President to call an international conference, or to accept an invitation on behalf of our Government to participate in one. Thus by an act passed in 1888 Congress "authorized and requested" the President to invite the several American governments to join the United States in a general American conference to be held in Washington in 1889.<sup>3</sup> One section of the act undertook to outline specifically the purposes for which the conference should be called, and expressly provided that the President "shall set forth that the conference is called to consider" these purposes. Among the matters named were several on which Congress is constitutionally empowered to legislate, including the establishment of uniform customs regulations, a uniform system of weights and measures, and laws to protect patent rights and copyrights. In relation to these subjects the position of Congress was stronger than with regard to other matters not falling within its constitutional competence. In spite of the mandatory "shall," however, the President could not be legally compelled to call the conference, nor to limit its deliberations to the consideration of the matters specified by Congress.<sup>4</sup>

<sup>1</sup> Senate Exec. Jour., III, 474 ff.

<sup>2</sup> For a summary of the debate in the House on the proposition, see Hinds, *Precedents*, II, 1014-1018.

<sup>3</sup> U. S. Stat. at L., 50th Cong., 1st sess., p. 155. (Act of May 24, 1888.)

<sup>4</sup> This act became a law without the signature of President Cleveland, during whose administration it was passed. The presiding officer of the conference was James G. Blaine, Secretary of State under President Harrison. To Blaine has often been attributed the merit of originating the Pan-American idea. Reinsch, *Public International Unions*, p. 78. For other instances of acts of Congress authorizing and requesting the President to call or participate in

The authority thus given by Congress to the President to call or participate in an international conference may be of practical importance in showing the support by the legislative branch of the policy involved. Should a conference be of such a character that participation in it by the United States might be regarded by another power as a ground for declaring war against us, Congressional approval of our participation in it would seem to be desirable.<sup>1</sup> Legally speaking, however, the President need not wait, even in this case, for specific authority from Congress. He might instruct our regular ambassador or minister to the country in which the conference is to be held to represent the United States at such meeting.<sup>2</sup> He might designate a special agent to attend the conference and provide for his compensation out of the contingent fund. In these ways the President, on his sole authority, could accept an invitation to participate in an international conference.<sup>3</sup> The President has, in fact, not infrequently accepted such invitations without waiting for any specific Congressional authority, and has appointed the American representatives without sending their names to the Senate. This was done, for example, in the case of the Hague Conferences of 1899 and 1907 and the Algeiras Conference in 1906.<sup>4</sup>

Acceptance by the President of invitations to participate in European conferences without authority from Congress or the Senate has been denounced as involving us in en-

international conferences, see 39 U. S. Stat. at L., 618; also acts of March 3, 1897, and February 20, 1907. See also U. S. For. Rels., 1878-9, p. 835.

<sup>1</sup> This was alleged in the case of our participation in the Panama Congress of 1826. Benton, *Abridgment of Debates in Congress*, VIII, 423 ff; IX, 107 ff.

<sup>2</sup> Thus, President Roosevelt appointed our ambassador to Italy, Mr. Henry White, to represent the United States at the international conference held at Rome to form the International Agricultural Institute. U. S. For. Rels., 1905, p. 560.

<sup>3</sup> This was admitted by Martin Van Buren in the debate in the Senate on the proposed American mission to the Panama Congress of 1826. Benton, *Abridgment*, VIII, 441.

<sup>4</sup> U. S. For. Rels., 1898, p. 543; *ibid.*, 1906, pt. 2, p. 1627. The United States participated in the Algeiras Conference as a signatory to the Treaty of Madrid of 1880. Malloy, *Treaties*, etc., I, 1220.

tanglements by mere executive action.<sup>1</sup> The practice has aroused opposition especially when it was capable of being construed as committing the United States to the payment of expenses connected with the conference before Congress had given authority therefor. The question might be raised, therefore, whether Congress could constitutionally limit the discretion of the President in extending or accepting invitations to participate in international conferences. This, in fact, it has attempted to do. In the deficiency appropriation bill passed on March 4, 1913, a provision was inserted which declared that "hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so."<sup>2</sup> By this stipulation Congress assumed to exercise the power of controlling the discretion of the President in this matter. If the provision were valid, he must secure in each particular case the prior specific authorization of Congress, and general authority implied from the existence of the contingent fund would not be sufficient.

Since the passage of the act of 1913, the President has generally, although not invariably, complied with its provisions. Thus, on September 10, 1919, President Wilson addressed a message to the Senate and House of Representatives in which, after reciting the provision of the act of 1913 quoted above, he transmitted a report of the Secretary of State relative to the proposed International Telegraphic Conference to be held in Washington in 1920, "for the consideration of Congress and for its determination whether it will authorize the extension of the invita-

<sup>1</sup> Thus, Senator Bacon declared: "The Executive may, without even sending any proposed treaty to the Senate, continue to send delegates to European international political conferences, and thus in time practically destroy our recognition of the long established doctrine of non-entanglement by us in such disputes. The sending of delegates from this Government to the Algieras Conference is a case in point." "The Treaty-Making Power of the President and the Senate," *North American Review*, CLXXXII, 509 (Apr., 1906).

<sup>2</sup> 37 U. S. Stat. at L., 913.

tion, and the appropriation necessary to defray the expenses incident thereto.”<sup>1</sup> In this message the President did not expressly request authority from Congress to extend the invitation, although such a request seemed to be implied. Even so, his action is not necessarily to be construed as a recognition of any legal power in Congress to control his discretion in this respect, but rather of the practical control of Congress in granting or withholding the necessary appropriations. To this extent, the act of 1913 represents an actual extension of Congressional authority, since, in most cases, participation in international conferences involves considerable expense.

In the act of 1913 no exception was made in the case of an international conference at which a treaty is to be negotiated. If the act were legally valid and enforceable it might, at times, operate as a serious check upon the power of the President to negotiate treaties. Yet by the practice, if not by the theory, of the Constitution, it has been almost uniformly recognized that the negotiation of a treaty is solely under the control of the President, subject only to the necessity of securing the advice and consent of the Senate to its ratification.<sup>2</sup> It seems clear that in negotiating a treaty through participation in an international conference, either in person or by his appointees, as in the cases of the Hague Conferences of 1899 and 1907 and the Paris Conference of 1919, the President is not bound to secure from Congress such specific authority as the act of 1913 purports to require. Again, could Congress limit the discretion of the President as commander-in-chief of the army and navy from entering, either in person or by his appointees, an international conference, during the course of a war, at which the terms of an armistice or capitulation

<sup>1</sup> House rept. 387, 66th Cong., 1st sess., pt. 1, p. 8. The President followed the same procedure with reference to the Sixth Annual International Sanitary Conference and the First Odontologic Latin American Congress to be held at Montevideo in September, 1920. Cong. Record, May 15 and May 20, 1920, pp. 7694 and 7976.

<sup>2</sup> See below, Chap. XX.

are to be drawn up and agreed upon? It seems clear that any attempt of Congress to do so would be in excess of its powers. Congress can constitutionally withhold funds which would enable the President to enter a conference at which the international good faith of the United States might be pledged, and may even withhold funds necessary to carry out such a pledge; but, on the other hand, it cannot limit by such an act as that of 1913 the constitutional powers of the President in the negotiation of treaties and in the discharge of his duties as commander-in-chief of the army and navy.

Even in the case of an international conference at which it is not proposed to negotiate a treaty, and which is unconnected with a war, any attempt by Congress to limit the President's discretion to participate, such as was made in the act of 1913, would be of doubtful constitutionality, since it would purport to limit the power of the President to treat with foreign governments which the Constitution impliedly confers upon him in granting him the right to send and receive ambassadors and other public ministers. If the President should see fit to disregard the limitation attempted to be imposed, it is difficult to see how Congress could control him in this respect, short of impeachment, except by declining to pass the necessary appropriations. This being true, it would seem that the same principle would apply to the case of a similar limitation attempted to be imposed upon the President through a Senate reservation to a treaty. Thus, one of the proposed Senate reservations to the Treaty of Versailles, as voted upon on November 19, 1919, prohibited any person from representing the United States under the treaty or the League of Nations, or from performing any act for or on behalf of the United States thereunder, until such participation and appointment should have been provided for and the powers and duties of such representatives should have been defined by law.

This part of the reservation would seem to trench upon the power of the President, recognized in practice, of treating with foreign governments through special diplomatic agents without specific authority of law, although it would doubtless be within the constitutional competence of Congress to provide by law for the permanent representation of the United States in the regular organs of the League.<sup>1</sup>

#### INSTRUCTIONS TO DIPLOMATIC REPRESENTATIVES

The powers and duties of diplomatic and consular officers of the United States are derived from four sources: customary international law, treaties, acts of Congress, and executive regulations.<sup>2</sup> Such functions as may be conferred by customary international law are considered as falling in that part of the whole mass of powers and duties which is not covered by instructions derived from the other three sources. The functions of consuls are derived to a considerable extent from treaties, and this source of consular functions was recognized by an act of Congress of 1792 which provided that the specification by Congress of certain powers and duties of consuls was not to be "construed as implying the exclusion of others resulting from the nature of their appointments, or prescribed by any treaty or convention under which they may act."<sup>3</sup>

The convention of 1899 between the United States and Great Britain relating to the tenure and disposition of real and personal property provided for its own extension to the insular territories of the United States "only upon notice to that effect being given by the representative of the United States at London, by direction of the treaty-

<sup>1</sup> The proposed Senate reservation was modified as voted upon on March 19, 1920. Cong. Record, vol. 59, p. 4899. Cf. Q. Wright, "Validity of the Proposed Reservations to the Peace Treaty," *Columbia Law Rev.*, XX, 136-8 (February, 1920).

<sup>2</sup> 7 Op. U. S. Atty.-Gen., 249.

<sup>3</sup> 1 Stat. at L., 257; R. S., sect. 1714.

making power of the United States.”<sup>1</sup> In this curious provision the attempt was made to subject a regular diplomatic representative of the United States, in a certain particular, to the direction of the President and Senate. Although the general powers and duties of diplomatic representatives might, to some extent, be regulated by international agreement, the employment of the treaty-making power as a means of giving specific instructions in particular cases seems hardly to be an appropriate method of procedure. The provision of the convention of 1899 is, moreover, open to objection as attempting to regulate by international agreement a matter which is properly one for purely domestic determination.<sup>2</sup>

The more usual methods of prescribing the powers and duties of diplomatic and consular officers are Congressional acts and executive regulations. By virtue of the coefficient or omnibus clause, together with the commerce clause, of the Constitution, Congress is endowed with authority to prescribe powers and duties for diplomatic and consular officers.<sup>3</sup> In the case of officers dealing with foreign relations, however, Congress has prescribed specific regulations only to a comparatively small extent. It has provided by act that no diplomatic or consular officer shall “correspond in regard to the public affairs of any foreign government with any private person, newspaper, or other periodical, or otherwise than with the proper officers of the United

<sup>1</sup>Malloy, *Treaties*, etc., I, 775. The last clause of this provision had originally read, “by direction of the President,” but was changed by a Senate amendment.

<sup>2</sup>Although this treaty provided that the direction in question should come from the “treaty-making power,” it might be construed to mean that the direction should come from the President and Senate acting jointly, but not through the making of a treaty, *i. e.*, not subject to securing the consent of any other power. This construction, however, does not materially diminish the objectionable character of the provision from the standpoint of constitutional practice.

<sup>3</sup>*Cf.* Kendall v. U. S. *ex rel.* Stokes, 12 Pet. 524; Shoemaker v. U. S., 147 U. S., 282. The powers and duties conferred by Congress should, however, be germane to the office, and not inconsistent with the Constitution. *Cf.* U. S. v. Ferreira, 13 How., 40.

States.”<sup>1</sup> For the most part, however, Congress has left such matters to be dealt with by executive regulations. Thus, in organizing the Department of State, it provided, as we have seen, that, in the management of foreign affairs, the Secretary of the department should “perform such duties as shall from time to time be enjoined on or intrusted to him by the President.”<sup>2</sup> Congress, however, cannot limit its own discretion, and the provision quoted does not prevent it from itself imposing duties upon the Secretary of State. Thus by act of 1915 Congress directed the Secretary to keep an efficiency record of secretaries in the diplomatic service and of consular and departmental officers and employees.<sup>3</sup>

An act of Congress passed in 1856 authorizes the President “to prescribe such regulations, and make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular officers. . . . It shall be the duty of all such officers to conform to such regulations, orders, and instructions.”<sup>4</sup> In the absence of such an act of Congress, however, the President, by virtue of his general executive power, might issue regulations and instructions and secure obedience to them through the exercise, or potential exercise, of his power of removal. In 1897 the State Department published a volume of instructions to the diplomatic officers of the United States. In addition, the published volumes of the “Foreign Relations of the United States” and the manuscript files of the State Department are full of instructions sent to our diplomatic representatives abroad.<sup>5</sup>

A distinction, however, must be made between the laying

<sup>1</sup> See R. S., sects. 1741, 1751.

<sup>2</sup> 1 Stat. at L., 28.

<sup>3</sup> 38 Stat. at L., 806.

<sup>4</sup> 11 Stat. at L., 60; R. S., sect. 1752.

<sup>5</sup> A volume of consular regulations was published in 1896, and the rules which it contained have since been added to from time to time. House doc. 303, 54th Cong., 2nd sess.



down of general rules prescribing the duties of all diplomatic officers, or of all those in a given class, and the giving of special instructions to diplomatic agents or to regular diplomatic officers with reference to particular matters which may come up in the course of their duties. The former function is one which is to some extent exercised by Congress and the Executive together; the Executive in this case merely reinforcing or supplementing the Congressional provisions or filling up gaps left by them. The latter function, however, is one which is not suitable for exercise by a legislative body, and it has been generally recognized as belonging to the Executive, although Congress has from time to time attempted to encroach upon this sphere of executive power.<sup>1</sup>

The special instructions given to regular diplomatic officers or to commissioners sent on special diplomatic missions, *e.g.*, to participate in an international conference or to negotiate a treaty, are formulated and signed by the President or the Secretary of State, and such officers and agents report to the authority from whom they receive their instructions.<sup>2</sup> The President may, on his own initiative or on request, transmit to Congress or to the Senate the special instructions which he proposes to give to particular

<sup>1</sup>Closely connected with the power of giving special instructions is the power of censuring diplomatic representatives for conduct while in office. In 1896 the House Committee on Foreign Affairs recommended the passage of a resolution condemning and censuring Ambassador Bayard at London for utterances contained in speeches made by him in England. The minority report of the committee, however, signed, among others, by H. St. G. Tucker, condemned the proposed action of the committee as "unwarranted and unprecedented." "Representatives of the United States in foreign countries," it declared, "are properly and exclusively, as to the regulation of the propriety or discreetness of their conduct, under the direction and control of the executive department of the Government, and any interference by Congress in this respect can have only the effect of detracting from the dignity and usefulness of our foreign service." House rept., 520, 54th Cong., 1st sess., pt. 2. For copies of Bayard's speeches, see House doc. 152, 54th Cong., 1st sess.

<sup>2</sup>See "Report of the Delegates of the United States to the Third International Conference of the American States," 1906, p. 39, for their instructions, signed by the Secretary of State. In the case of the Second International Conference of American States, 1901, the instructions of our delegates were signed by the President (*ibid.*, pp. 45-49). For the instructions and report of the American delegates to the first and second Hague Conferences, see *For. Rels. of U. S.*, 1899, pp. 511, 513; *ibid.*, 1907, pt. 2, pp. 1128, 1144.

diplomatic representatives. Thus, in 1792 President Washington submitted to the Senate for its approval the instructions in conformity with which he proposed that the commissioners appointed to negotiate a treaty with Spain should act. The instructions were approved by the Senate and were acted upon by the commissioners.<sup>1</sup> This action of the first President, however, was not considered a binding precedent either by himself or by subsequent Presidents. In the case of the mission of Jay to negotiate a treaty with Great Britain, President Washington failed to send his instructions to the Senate, and this gave rise to the introduction in that body of a resolution requesting him to do so. But the resolution was defeated.<sup>2</sup> Even if it had passed, it would admittedly have been a mere request, which the President need not have heeded. President Polk, in refusing the request embodied in a resolution of the House of Representatives that he communicate, if not inconsistent with the public interests, copies of instructions given to the commissioners appointed to conduct treaty negotiations with Mexico, said: "I avail myself of this occasion to observe that, as a general rule applicable to all our important negotiations with foreign powers, it could not fail to be prejudicial to the public interest to publish the instructions to our ministers until some time had elapsed after the conclusion of such negotiations."<sup>3</sup>

In 1798 the House of Representatives considered a resolution requesting the President to communicate to it the instructions to and dispatches from the envoys extraordinary to France, known as the "X Y Z" mission.<sup>4</sup> A pro-

<sup>1</sup> Senate Exec. Jour., I, 106, 115; Crandall, *Treaties: Their Making and Enforcement*, 69.

<sup>2</sup> Exec. Jour., I, 151; Crandall, *op. cit.*, 70.

<sup>3</sup> Richardson, *Messages and Papers of the Presidents*, IV, 602; Hinds, *Precedents*, II, 988. President Polk had previously declined fully to comply with an unconditional request of the House of Representatives, contained in a resolution of January 4, 1848, for a copy of the instructions issued to our minister to Mexico. Richardson, *op. cit.*, IV, 565-7; Hinds, *Precedents*, II, 986-7.

<sup>4</sup> *Annals of Cong.*, 5th Cong., cols. 1370, 1371.

posed amendment to add the words: "or such parts thereof as considerations of public safety and interest, in his opinion, may permit" was defeated. In the debate several members expressed doubt as to the propriety and constitutionality of the call as far as it related to instructions given to our ministers.<sup>1</sup> The resolution was nevertheless passed by a vote of more than two to one, and the instructions, with slight reservations, were transmitted to the House by the President.<sup>2</sup> Again, during the Senate's consideration of the treaty of peace with Spain a resolution was passed, in 1899, requesting the President, so far as in his judgment was not inconsistent with the public interest, to communicate to the Senate all instructions given by him to the commissioners who negotiated the treaty. President McKinley complied with this request by transmitting the original instructions.<sup>3</sup> In neither of these cases, however, was the President legally bound to respond. He did so only through practical considerations of policy and expediency, or through a desire to act in a spirit of comity with the legislative branch.

Congressional requests for diplomatic instructions after they have been given and acted upon is a less serious interference with executive power than an attempt by Congress, or either branch thereof, to dictate to the President or to participate with him in the giving of such instructions, or to give them directly. In connection with the request of President J. Q. Adams that Congress appropriate the necessary funds to enable him to send ministers to the Panama Congress of 1826, the House of Representatives considered a proposition expressing the sense of that body as to what the ministers ought and ought not to do. In defense of this proposition it was argued that the power of the House to appropriate for the expenses of the mission carried with it

<sup>1</sup>See remarks of Mr. Bayard, *Annals of Cong.*, 5th Cong., col. 1359, and of Mr. Hartley, *ibid.*, col. 1369.

<sup>2</sup>Richardson, *op. cit.*, I, 265.

<sup>3</sup>Senate doc. 148, 56th Cong., 2nd sess., pp. 3-8.

the right to impose conditions. Opposition, however, was led by Daniel Webster, who argued that the House had no right to decide what should be discussed by particular ministers, and that, if such instructions might be given by the House in this case, they might be given in all cases, thus usurping the prerogative of the Executive.<sup>1</sup> It was also pointed out, in the course of debate, that the House proposition was an attempted infringement upon the treaty-making power. Attention was called, too, to the confusion which would result if the House and Senate separately undertook to give instructions which turned out to be incompatible. The proposition was eventually defeated.<sup>2</sup>

In this matter, as in other phases of our foreign relations, the power of Congress to appropriate necessary funds for foreign missions may indirectly operate to give some practical influence over the determination of the instructions of our commissioners, and any expression of opinion by Congress is entitled to weight and due respect, as that of representatives of the people from whom all authority is ultimately derived. This is especially true of the Senate when the commissioners are appointed to negotiate a treaty which must subsequently be submitted to that body for approval. The President, however, is recognized as having control over the negotiation of treaties, and may appoint for their negotiation special agents who act solely under his direction. Neither Congress nor either branch thereof

<sup>1</sup> Benton, *Abridgment of Debates*, IX, 94-95. Webster also declared that the appropriation power of the House did not enable it to give any gifts of its own, since it was rather the steward over a trust fund.

<sup>2</sup> Benton, *Abridgment*, IX, 217. The proposition carried, however, in committee of the whole by a vote of 99 to 95 (*ibid.*). For summary of the debate, see Hinds, *Precedents*, II, 1015-1018. In 1912 the House Committee on Foreign Affairs reported favorably a joint resolution authorizing the President to instruct the delegates of the United States to the next Hague Conference and to the next Pan-American Conference to express the desire of the United States that the nations represented should guarantee their territorial boundaries and not seek to increase the same by conquest. House rept. 705, 62nd Cong., 2nd sess. In the previous year this committee reported favorably a joint resolution to instruct the delegates of the United States to the Third Hague Conference. House rept. 2216, 61st Cong., 3rd sess. Neither of these resolutions, however, was adopted.

can legally control the President's discretion in instructing these agents. The President exercises not only legal control but predominating practical influence, both through his power to negotiate treaties and through his power to appoint and remove diplomatic officers and agents.<sup>1</sup>

#### RECEPTION OF DIPLOMATIC ENVOYS

As indicated above, the Constitution vests the power of receiving "ambassadors and other public ministers" in the President. This phrase, as Attorney-General Cushing pointed out, embraces "all possible diplomatic agents which any foreign power may accredit to the United States."<sup>2</sup> Although consuls are not mentioned by the Constitution in this connection, it is established in practice that they must be recognized by exequatur of the President before entering upon their duties. Moreover, this power of the President with regard to all classes of foreign diplomatic and consular agents is exclusive; for the President, as we have seen, is the sole organ of communication with foreign states.<sup>3</sup> It was apparently expected by the framers of the Constitution that this function would be purely ceremonial. In reality, however, as will be shown, it has become an im-

<sup>1</sup> Cf. the remarks of Senator Spooner, already quoted: "He [the President] may issue to the agent chosen by him—and neither Congress nor the Senate has any concern as to whom he chooses—such instructions as seem to him wise. He may vary them from day to day. That is his concern. The Senate has no right to demand that he shall unfold to the world or to it, even in executive session, his instructions or the prospect or progress of the negotiation." *Supra*, p. 334 n. In this connection it may be mentioned that President McKinley changed by cable the original instructions of the United States commissioners at the Paris peace conference of 1898.

<sup>2</sup> 7 Op. U. S. Atty.-Gen., 209.

<sup>3</sup> See note of Secretary J. Q. Adams in 1818 in which, with reference to a communication from the Swedish Government addressed to the "President and Senate of the United States," he took occasion to point out that all ceremonial communications from foreign governments should be addressed to the President alone, and declared that "the authority to receive foreign ministers is vested exclusively in the President." *Moore's Digest of Internat. Law*, IV, 462. This did not mean, however, that ordinary communications might not be addressed to the Secretary of State.

portant factor in enabling the President to exercise the power of recognizing foreign governments.

#### TERMINATION OF DIPLOMATIC MISSIONS

About a dozen different ways in which diplomatic missions may terminate are usually enumerated in works on international law.<sup>1</sup> The most important are the recall and the dismissal. The recall is used by our Government in the case of our own diplomatic officers accredited to a foreign government, while dismissal is applied to a representative of a foreign government accredited to us. A recall may be brought about on the initiative of our Government, or it may be brought about at the request of the foreign government to which the diplomat is accredited. Changes in the diplomatic service of the United States usually take place concurrently with a change of administration at Washington, even though there has been no change of party control in Congress. When a new administration comes in, our diplomatic representatives abroad customarily submit their resignations to the President. The power of the President to recall diplomatic representatives is merely one phase of his general power, now well established, of removing all officers of government who are appointed by him, whether alone or with the advice and consent of the Senate.<sup>2</sup> According to the Printed Instructions issued by the State Department, "A recall is usually accomplished at the pleasure of the President, during a session of the Senate, by sending to that body the nomination of the officer's successor. Upon the confirmation and commission of his successor, the original incumbent's office ceases."<sup>3</sup> The

<sup>1</sup> See, e.g., Oppenheim, *International Law*, I, 476 ff.; Foster, *Practice of Diplomacy*, Chap. IX.

<sup>2</sup> *Parsons v. United States*, 167 U. S., 324. Congress, however, may regulate removals in the case of inferior officers whose appointment it has vested in heads of departments. *United States v. Perkins*, 116 U. S., 483.

<sup>3</sup> "Instructions to Diplomatic Officers of the United States," quoted in Moore, *Digest of Internat. Law*, IV, 470.

President, however, may recall a diplomatic officer without appointing a successor, and thus allow the post to remain vacant.

The question may be raised whether Congress, as well as the President, has not power to remove diplomatic representatives from office. This it undoubtedly has, through the process of impeachment. This method of removal, however, is so cumbersome as to be, for practical purposes, almost entirely ineffective as a means of control. In 1855 Congress passed an act requiring consuls to account for the fees collected by them, "under penalty of being removed from office." Attorney-General Cushing held this penal clause to be inexecutable and of dubious legality. "Does the act," he asked, "mean to dictate to the President when to remove a public officer? That cannot be. The power of removal, and the absolute right to exercise it according to his conscience, like the power of appointment, he holds by the Constitution."<sup>1</sup>

Foreign diplomatic representatives accredited to our Government cannot be reached by Congress, even by impeachment, and their right to continue to act is dependent upon the pleasure of the President. The right of the President to dismiss the representatives of foreign nations at our capital may be implied, not only from his general control of foreign affairs, but also from the power granted him by the Constitution to receive ambassadors and other public ministers. This is a power which, it is recognized, should be exercised by the President only under great provocation, since a request directed to the foreign government to recall the obnoxious minister is usually equally effective. Nevertheless it has been exercised by the President on several occasions, one of the most famous being that on which Lord Sackville-West, the British minister, having been guilty of an indiscretion, was handed his passports in

<sup>1</sup>7 Op. Atty.-Gen., 251.

1888, by Secretary Bayard.<sup>1</sup> In 1917 Count Bernstorff, the German ambassador, being implicated in plots against our peace and safety, was handed his passports by the Secretary of State, by direction of the President.<sup>2</sup>

The power of severing diplomatic relations with a foreign government, whether through recall or dismissal, is of great importance. Its use is likely to make more difficult the maintenance of friendly relations between the two countries in question, and may be the preliminary step to war. But, although the exercise of the power involves grave responsibility, it rests with the President alone. In February, 1917, President Wilson severed diplomatic relations with Germany on his own responsibility and without consulting Congress, merely announcing to that body the fact that he had done so.<sup>3</sup> Two months later Congress declared war.

#### THE COURTS AND DIPLOMATIC ENVOYS

Under the Constitution, the Supreme Court has original jurisdiction in all cases affecting ambassadors and other public ministers and consuls. Foreign ambassadors and ministers are entitled to extensive diplomatic immunities, and on that account are not subject to suit or prosecution in our courts, although they may bring such suits therein against private citizens. Whether a person claiming to be a foreign diplomatic envoy is really such, is for the President to decide. His recognition as an envoy by the President is conclusive upon the judiciary.<sup>4</sup>

<sup>1</sup> The President may also dismiss consuls by revoking their exequaturs. For examples of Presidential proclamations revoking exequaturs of foreign consuls, see Richardson, *Mess. and Pap. of the Presidents*, VI, 219, 511, 512. Cf. *Coppell v. Hall*, 7 Wall., 542, 553; Moore's *Digest of Internat. Law*, V, 19 ff.

<sup>2</sup> In 1915 our Government requested and secured the recall of Dr. Dumba, the Austro-Hungarian ambassador.

<sup>3</sup> Address at joint session of Congress, Feb. 3, 1917. On April 19, 1916, however, the President had appeared before Congress and informed it of his warning to Germany that unless she immediately abandoned her methods of submarine warfare our Government would be forced to sever diplomatic relations with her altogether.

<sup>4</sup> *In re Baiz*, 135 U. S., 403; *United States v. Ortega*, Fed. Cas. No. 15,971 (1825).



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## CHAPTER XX

### THE CONSULAR SERVICE

WHEN the United States became an independent nation it inherited the principles governing the diplomatic and consular systems then existing in the Old World. The rights and privileges of our consuls abroad are therefore derived in part from international usage. Their position is also regulated by treaties and by statutes and ordinances of our domestic authorities. They are stationed in important political and commercial places throughout the world; and, unlike the members of the diplomatic service, they have dealings mainly with the local authorities rather than with the central governments.

### HISTORICAL DEVELOPMENT

At first, the United States had no consular service separate from the diplomatic service; the same officers performed both diplomatic and consular functions, reproducing, in this respect, the history of the consular systems of Europe. This lack of differentiation between the two services produced inconveniences, even at a time when our foreign commerce was comparatively small, and as the importance of our foreign relations increased, it became more obvious that a separate consular service would have to be established, in order that special attention might be paid to consular functions, as well as to relieve officers whose duties were primarily diplomatic from the distractions of consular responsibilities.

The framers of the Constitution expressly recognized in

that instrument the distinct status of consuls. It was provided that consuls should be appointed by the President, by and with the advice and consent of the Senate. It was also stipulated that the judicial power of the United States should extend to all cases affecting consuls. The Supreme Court was given original, but not exclusive, jurisdiction in such cases; hence suits against foreign consuls may be brought in the lower Federal courts. These provisions have the effect of excluding the state courts from jurisdiction in cases affecting consuls, unless these officials voluntarily bring suits in such courts.

The first act of Congress relating to the consular service after the adoption of the Constitution was delayed until 1792. Meanwhile, however, President Washington, recognizing the need of creating an independent consular service, appointed some sixteen consular officers under his constitutional authority and without waiting for any special Congressional authorization. Inasmuch as these officers received no compensation out of the treasury of the United States, it was not necessary for Congress to make an appropriation for this purpose. The provisions of the act of 1792 indicated that, in the mind of Congress, the object of the consular service at that time was not so much to promote and extend American commerce as to afford protection to American merchants and sailors and to administer the estates of American citizens dying abroad without legal representatives on the spot. Both the provisions and the omissions of the act of 1792 give evidence of the crudity and undeveloped condition of the consular service at that time. Thus, no qualifications were required for entrance into the service. Foreigners might be employed, and this was sometimes done in places where it was impracticable to induce Americans to accept appointment. Consuls might, and not infrequently did, engage in trade of a private nature, so that they did not give their undivided attention to their public duties. Except in the Barbary states, con-

suls received no salaries, but derived their compensation from fees, whose amount varied considerably from place to place, according to the volume of business transacted. No accurate account of these fees was kept at Washington.

In 1833 Secretary Livingston, after investigation, made a report recommending that the service should be reformed by prohibiting consuls from engaging in private business, by substituting salaries for the fee system, and by establishing a more precise definition of consular powers and duties. Congress, however, failed to adopt these suggestions until many years later. After passing, in 1855, an abortive act, some of whose provisions were, in the opinion of Attorney-General Cushing, unconstitutional, Congress enacted in the following year an important law carrying out to some extent Livingston's recommendations. This measure more exactly defined certain of the powers and duties of consuls, and the President was given authority to supplement the law in this respect by issuing regulations having the force of law. Consulates were divided into three classes, in the order of their importance. Consuls in the first class were put upon a salary basis and were prohibited from engaging in private trade. Those in the second class also received salaries, but might engage in trade. The third class remained on the fee basis, and an attempt was made to secure from members of this class an accounting of the amount of fees collected; but no adequate means were inserted in the act for the enforcement of this provision. Non-trading consuls were given an extra allowance of ten per cent. of their respective salaries for office rent, which was afterwards increased to twenty per cent. But even the larger amount proved inadequate.

Another interesting feature of the law of 1856 was the authority granted the President to appoint a number of consular "pupils," or clerks, at a salary of \$1,000; though Congress failed to make an appropriation for them until

1864.<sup>1</sup> They were to enjoy comparatively secure tenure, and it was intended that, when they had received training in these subordinate positions, they would be promoted to the higher ranks. The provision has not been successful in accomplishing this object, but it marks the first attempt by law to put any branch of the consular service on a permanent basis, protected from the raids of spoils politicians to which the service had been subject. A further extension of this idea was made by President Cleveland through an executive order of 1895 providing that vacancies in the lower grades of consuls should be filled either by transfer from the Department of State or by appointment from among persons who had been designated by the President and had passed an examination set by a board of three persons appointed by the Secretary of State. The greatest step in this direction, however, was taken in an executive order of President Roosevelt, issued in 1906, which followed an act of Congress of the same year reorganizing the service. These important measures toward a more permanent consular service were taken as the result, in part, of a more general appreciation of the value and importance of the consular service, especially in connection with the promotion of commerce. Since the Spanish War the functions of consuls in this respect have become far more important than before, on account of our increasing influence and responsibilities abroad, our more numerous contacts with other nations, and the great expansion of our international trade.

#### GRADES OF CONSULAR OFFICERS

At first, there was little or no official gradation in the consular service, but gradually distinctions of rank have developed. Although the term consul may be used ge-

<sup>1</sup> The salaries of consular clerks, or assistants, as they are now called, were raised by act of 1918 to \$1,500 for the first year and up to \$2,000 for the fourth year of continuous service.

nerically to embrace all consular officers, it is also used as the designation of one of the particular grades. The various grades of consuls may be divided into three groups: principal, subordinate, and special. The principal consular officers are consuls and consuls-general. The latter grade was created because it was found that, in certain Oriental countries, a mere consul was at a disadvantage in obtaining interviews and concessions. Consuls-general of the United States, however, are now found in most of the principal countries, and they exercise a limited supervision over the consuls in the respective countries in which they are stationed. In a few instances they also have functions of a diplomatic nature. Otherwise, their powers and duties are practically the same as those of consuls. The President is authorized by law to define the extent of territory to be embraced within any consular district, and this usually includes all places nearer to a particular consul than to any other.

A special grade of consular officer is that of consul-general at large, or inspector of consulates, which was created by the act of 1906. Eight of these officers are now provided for. They are appointed only from members of the consular force having the requisite qualifications of experience and ability.<sup>1</sup> Their duty consists in visiting and inspecting each consulate and consulate-general at least once every two years; and if they find that any of these offices are not properly conducted, they may be authorized by the President to suspend the principal officer and to administer the office for a period of ninety days. During such period they may also suspend, for proper cause, any subordinate officers or clerks attached to such office. In the group of special consular officers may also be mentioned consuls who are assigned to serve as assistants to consuls-general in economic investigational work.

<sup>1</sup> Consuls-general at large receive salaries of from \$6,000 to \$8,000 and traveling and subsistence expenses. They are now known as foreign service officers detailed as inspectors.

Subordinate consular officers and grades include vice-consuls, consular clerks, and consular agents.<sup>1</sup> In certain Oriental countries there are also interpreters and marshals. Vice-consuls perform consular duties subordinate to consuls and consuls-general within the limits of the consulate, and may also act as substitute officers when the principal consular officers are temporarily absent from their posts. There are two grades of vice-consuls: those *de carrière* and those not of career. The former are appointed by promotion from the lower ranks or grades, or from candidates who have passed an examination, while the latter are appointed without examination. Vice-consuls not of career, however, may not be promoted to the grade of vice-consul *de carrière* without undergoing the usual examination. Consular agents are officers subordinate to a consul or consul-general. They exercise limited consular functions at places different from those at which their principals are located. They are permitted to engage in private business, and are usually local merchants. They are allowed compensation of not more than \$1,000 a year, which is paid from one-half of the fees they collect. Consular officers are required to account to the Department of State for all fees received. All grades of consular officers, with the exception of consular agents, are paid a salary fixed by law, and fees which come to them must be turned into the treasury of the United States. All persons in the consular service receiving a salary of \$1,000 or more are required by law to be American citizens, and are prohibited from engaging in private trade.

Supervision and direction over the consular service is maintained by the Department of State, in which, as we have seen, a consular bureau has been created. Instructions and regulations are issued from time to time to con-

<sup>1</sup> The offices of vice-consul-general, deputy-consul-general, and deputy-consul and the grades of commercial agent and consular assistant have now been abolished

sular officers. The consuls-general at large, when traveling on inspection trips, act under the instructions of the Secretary of State. Careful watch is maintained in Washington over the manner in which the various consular officers handle their official business, and a detailed efficiency record of the work of each of them is kept in the department.

#### APPOINTMENT, PROMOTION, AND REMOVAL

As already noted, the Constitution provides that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint consuls, but also that Congress may by law vest the appointment of inferior officers in the President alone or in the heads of departments. Consuls, consuls-general, and consuls-general at large are appointed by the President and Senate. Vice-consuls and consular agents are appointed by the Secretary of State, usually upon the nomination of the principal consular officer. The President, acting alone, is authorized by law to appoint consular assistants or clerks. Formerly all appointments were to particular posts; transfers were not permissible; and if a consul was forced by war or unsettled conditions to abandon his post, his salary ceased. As a result of conditions which arose in important commercial centers during the early stages of the World War, the disadvantages of this inflexibility of the service were accentuated and, in order to relieve the situation, Congress passed, in 1915, a law prescribing that consuls and consuls-general shall be appointed to grades and not to posts. It was also provided that transfers might be made from post to post within the grade by executive order. The consent of the Senate is not required except for promotions and new appointments. The operation of this law has resulted in greater mobility and elasticity in the service, enabling the State Department better to adjust the personnel of the serv-



ice to changing conditions, notably in Europe and in Mexico.

The act of Congress passed in 1906 for the reorganization of the service divided the grades of consul and consul-general into a number of classes according to salary. The act was defective, however, in that it failed to make any provision for the merit system in appointments. Accordingly, President Roosevelt, in the same year, acting by virtue of the law of 1883 authorizing the Chief Executive to cover civil servants of the United States into the classified service, issued an executive order which, as amended and supplemented by later act, regulations, and executive orders, provided in substance that vacancies in the offices of consul-general and the higher classes of consuls should be filled by promotion on the basis of efficiency from the lower grades of the consular service or by transfer from the Department of State. Vacancies in the two lowest classes of consuls were to be filled either by promotion on the basis of ability and efficiency from the ranks of vice-consuls, consular assistants, and interpreters, or by new appointment of candidates who had satisfactorily passed examinations.

Candidates for new appointment in the service must be between twenty-one and fifty years of age and citizens of the United States, and they must be specially designated by the President for appointment subject to examination. The board of examiners consisted of the director of the consular service, the chief of the consular bureau, an officer of the Department of State designated by the President, and an examining officer from the United States Civil Service Commission. The board was thus composed of two elements: first, officials of the department in which the consuls appointed were to serve, and, secondly, an official of the general civil service examining body. This arrangement was designed to overcome the lack of understanding and coöperation which sometimes arose between the Civil

Service Commission and the departments to which members of the classified service were attached. The examination consists of two parts, oral and written, the two counting equally. The oral examination is designed to ascertain the candidate's alertness, address, and personality. The written examination is designed to test his knowledge of such subjects as modern foreign language, geography, the resources and commerce of the United States, political economy, international, commercial, and maritime law, modern history, and American history, government and institutions. Candidates for appointment in countries in which the United States exercises extraterritorial jurisdiction are also examined in the fundamental principles of the common law, the rules of evidence, and the trial of civil and criminal cases. Candidates who attain, on the whole examination, an average mark of at least 80 are certified by the board as eligible for appointment and remain on the eligible list for two years unless sooner appointed.

Both in designations by the President and in appointments after examination, regard is had for the rule that, as between candidates of equal merit, appointments shall be so made as to secure proportional representation of all the states. Absolute geographical representation is, of course, not practicable. Even so far as it is practicable, it is a handicap to the working of the merit principle. The rule has been called one of the penalties which had to be paid in order to get the system established.<sup>1</sup> The executive order of 1906 declares that "neither in the designation for examination or certification or appointment will the political affiliations of the candidate be considered." Inasmuch, however, as it is necessary that Presidential nominations to consulships be confirmed by the Senate, there is at least a possibility that political considerations will be involved in the appointments through the operation of the rule of

<sup>1</sup>W. J. Carr (director of the consular service), in *Conference on Training for Foreign Service*, 24.

"Senatorial courtesy." This is borne out by the statement of the director of the consular service that it is customary to ask a candidate to place on file with the department a letter from the Senators of his state, recommending or consenting to his appointment.<sup>1</sup>

The merit system of appointment to the consular service as thus outlined has not yet been applied to its full extent. It applies only to the lowest grades of consuls. In the main, it rests merely on executive orders, which may be changed by the President at any time. Moreover, it does not apply to removals from the service, which may still be made for political reasons. In spite of these deficiencies, however, there can be no denying that, within the past decade or two, the tone and character of our consular service have considerably improved. It has been urged that a still greater improvement could be secured if the Government would establish a special institution for training men for the service. But, as the director of the service has pointed out, the small number of men who can hope to gain admission seems to make the establishment of such an institution impracticable.<sup>2</sup>

#### POWERS AND DUTIES

A newly appointed consul proceeds to Washington, where he receives his instructions and executes the required bond. He then goes on to his post. Before entering upon the discharge of his duties, however, he must obtain his *exequatur*, which is the official recognition by the foreign government of his status as consul. Its bestowal constitutes formal permission by that government for him to perform his official duties. The request for the *exequatur* is made upon the minister of foreign affairs of the foreign government by the principal diplomatic officer of the United States in the country concerned. The foreign government has a right

<sup>1</sup> *Conference on Training for Foreign Service*, 20.

<sup>2</sup> *Ibid.*, 25.

to refuse the request, although this is not often done, and may also revoke the exequatur at any time, which action is equivalent to a dismissal of the consul. It is not required that any reason be assigned for refusing or revoking an exequatur, although considerations of international comity dictate that the grounds of such action shall, as a rule, be stated.

The duties of consuls are stipulated partly in acts of Congress and partly in orders and regulations prescribed by the President and issued by the Department of State. By act of 1856 Congress assumed to authorize the President "to prescribe such regulations and to make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular officers . . . from time to time as he may think conducive to the public interest."<sup>1</sup> The acts of Congress and executive regulations are supplemented by the provisions of special treaties and the general usages of international law. At first only occasional circular instructions were issued by the State Department. In 1833 a short code of instructions was drawn up by Secretary Livingston. These have been added to from time to time, and in 1896 a comprehensive compilation of regulations was issued.<sup>2</sup>

Upon taking charge of his office the consul notifies the Department at Washington and likewise the principal diplomatic officer of the United States in the country where he is located. He also familiarizes himself with local regulations, and with the treaties between the two countries. His duties may be broadly classified as negative and positive. Negatively, it is his duty not to express publicly his opinion on local political questions and not to accept gifts, offices, or titles from the foreign government except with the special consent of Congress. His positive duties are more

<sup>1</sup> 11 Stat. at L., 60.

<sup>2</sup> House doc. No. 303, 54th Cong., 2nd sess.

numerous and varied. They may be divided into two main classes: (1) those relating to the promotion of American trade and commerce, and (2) those pertaining to the protection of the interests of the American Government and of American citizens.

The activities of the consul in connection with the promotion of trade consist largely in the collection and reporting of information concerning commercial conditions and opportunities abroad. He supplies this information in part by answering inquiries addressed to him by American exporters and business houses, but more generally by sending reports to the department at Washington regarding the possibilities of foreign markets for American products. Prior to 1880 consular reports were collected and published in an annual volume. This publication was, however, of comparatively little practical use, because the information was often largely out of date before it became generally available. Beginning in 1880 monthly reports were issued, and in 1898 a series of daily reports was started. Since some of the matter sent in by consuls does not bear directly on commerce, or is not in the most usable form, a considerable amount of editing of the reports is done by the consular bureau in the State Department before they are issued to the public.

The principal subjects upon which information is supplied by the consular reports are the special demands of local markets due to prevailing customs or prejudices, or to unusual shortage of crops; changes in foreign laws bearing on commerce, such as customs regulations, patent laws, and food laws; and foreign methods of doing business. Information which the reports supply upon these topics is frequently of much value to American business men. It will doubtless become still more useful as the members of the consular service gain in expertness and as business men themselves learn how to coöperate with the consuls more effectively.

The second main class of positive duties of consuls consists in the protection of the interests of the American Government and of American citizens. These duties may be subdivided according as they relate to (1) the enforcement of the customs regulations, (2) immigration and quarantine, (3) shipping and seamen, and (4) American citizens other than seamen. Closely connected with the promotion of trade is the work of consuls in detecting and preventing violations of the customs revenue laws of the United States through the efforts of foreign producers to undervalue their goods or of individuals to smuggle valuable articles into this country. Consuls are required to certify to the correctness of the valuation of merchandise shipped from foreign countries to the United States, and, in order to do so intelligently, must investigate the costs of manufacture abroad.

Consuls are required to aid in the enforcement of the immigration laws of the United States, especially with reference to the exclusion of certain prohibited classes of immigrants, such as contract and Chinese laborers, criminals, paupers, and persons suffering from contagious disease. Before a vessel sails from a foreign port for the United States the master is required to submit to the American consul a list and description of the immigrants on board, and the consul must satisfy himself of its accuracy. This record is later to be submitted to the immigration inspector at the port of arrival. The consul also inspects the sanitary and health conditions of the vessel, crew, passengers and cargo; or he employs inspectors for this purpose. If such conditions are found satisfactory, he issues to the vessel a bill of health.

In addition to certifying to the bill of health the consul is also required to inspect and satisfy himself as to the correctness of the other papers of the ship, such as the charter-party, crew list, and certificate of registry. In case an American vessel is wrecked or stranded, it is the duty

of the nearest consul to render such assistance as may be possible, by taking action for the preservation of the ship and cargo and relieving the distress of passengers and crew. He is authorized to send shipwrecked American seamen back to the United States. Seamen as a class are, indeed, under the special protection of the consul, on account of their liability to be imposed upon. The consul supervises the engaging and discharge of seamen in a foreign port, and sees that they understand the terms of their contracts and that their wages are duly paid. He undertakes to settle disputes which may arise between master and seamen, investigates charges of mutiny upon the high seas, and may send mutineers back to the United States for trial.

In regard to American citizens other than seamen, consuls "are expected to endeavor to maintain and promote all the rightful interests of American citizens and to protect them in all privileges provided for by treaty or conceded by usage; to visé, and, when so authorized, to issue passports; when permitted by treaty, law, or usage, to take charge of and settle the personal estate of Americans who may die abroad without legal or other representatives, and remit the proceeds to the Treasury in case they are not called for by a legal representative within one year."<sup>1</sup>

#### EXTRATERRITORIALITY

In addition to the foregoing duties, our consuls are invested with certain judicial powers in a few countries whose methods of administering justice are considered distinctly below the standard commonly prevailing in civilized states. In such countries, including China, Egypt, Siam, and Morocco, the United States exercises the right of extraterritoriality, whereby consuls have power to try civil cases to which Americans are parties, and, in some instances,

<sup>1</sup> *American Consular Service*, 5-6.

also to try criminal cases. Inasmuch as the rights of American consuls in this respect rest upon treaties, consular conventions, or "capitulations" with the particular countries, they vary from one country to another according to local conditions. Indeed, in the case of Turkey, there has been a long outstanding difference of opinion between the two governments as to the validity and interpretation of the capitulations. In general, however, it may be said that the American consul in these countries has a right to hear and determine all disputes of a justiciable nature between American citizens and all in which an American citizen is defendant.

In 1860 Congress passed an act providing that the jurisdiction of consuls, in both civil and criminal cases, should be exercised in conformity with the statutes of the United States in so far as they should be found suitable. In so far as the statutes were not suitable, the common law and the law of equity and admiralty were to be applied; and if none of these furnished appropriate remedies, the principal diplomatic officer of the United States should supply such deficiencies by issuing regulations having the force of law.<sup>1</sup> Inasmuch as the common law differs in different states, there was at first some doubt as to the meaning of this provision. The circuit court of appeals, however, held that what was intended was the common law in force in the several American colonies at the date of separation from Great Britain.<sup>2</sup>

There was also at first some doubt as to whether the Anglo-Saxon principle of trial by jury, as provided for in the Constitution, was applicable to cases tried in consular courts. In 1880 an American seaman named Ross committed murder on board an American vessel in the harbor of Yokohama, Japan, in which country the United States at that time exercised extraterritorial jurisdiction. The

<sup>1</sup> 12 Stat. at L., 73; R. S., sect. 4086.

<sup>2</sup> *Biddle v. United States*, 156 Fed., 762.



offender was convicted in a trial before the American consular court, without either a grand or petit jury. Ten years later, while serving a life sentence in the United States, he applied for a writ of habeas corpus on the ground that his conviction without trial by jury was unconstitutional. The Supreme Court held, however, that the Constitution of the United States can have no operation in another country and that Congress, therefore, in regulating the procedure in consular courts, is not limited by the bill of rights of the Constitution. As a further reason for its opinion, the court pointed out that it would ordinarily be impracticable to operate the jury system in such courts, on account of the difficulty of obtaining a competent grand or petit jury.<sup>1</sup>

In 1906 Congress passed an act providing for the establishment of the United States Court for China, to exercise appellate jurisdiction in such cases as might be tried in that country by the consular courts. The court was to have a special judge, appointed by the President with the consent of the Senate; and the headquarters were to be at Shanghai, although sessions might be held at other places. The former consular courts, however, were not entirely superseded; they may still hear minor civil and criminal cases, subject to appeal to the court at Shanghai. It was also provided that appeals should lie from the final judgments and decrees of this tribunal to the circuit court of appeals at San Francisco, and thence to the Supreme Court of the United States.<sup>2</sup>

#### PRIVILEGES AND IMMUNITIES

Consuls, not being public diplomatic ministers, are not entitled to the privileges and immunities accorded to dip-

<sup>1</sup> *In re Ross*, 140 U. S., 453. Cf. *Dainese v. Hale*, 91 U. S., 13.

<sup>2</sup> On the United States Court for China, see Hearings before the Committee on Foreign Affairs of the U. S. House of Representatives on the bill (H. R. 4281) relating to the United States Court for China, 1917; C. S. Lobingier (judge of the U. S. court for China), "The Judicial Superintendent in China," *Illinois Law Review*, XII, 403-408 (Jan., 1918); W. R. Austin,

lomatic envoys, and, except in the undeveloped countries mentioned above, the principle of extraterritoriality does not apply to them. They are accorded certain privileges and immunities, however, by the general rules of international law, and these have been modified in particular cases by consular treaties and conventions with the respective countries. Such treaties usually provide that a consul may display the national flag and arms at the consulate, and that his dwelling and the archives of the consulate shall be inviolate. Consuls are exempt from compulsory process to testify in court when such service would interfere with their official duties.<sup>1</sup> Unless a citizen of the country in which he is stationed, a consul is also exempt from service on juries and in the military forces.

Consuls are not subject to taxation on their salaries or official business, but they are liable for private debts and may be taxed on any private business in which they are engaged or on any income which they derive from private sources. In the absence of treaty stipulation, they are subject to arrest, trial, and conviction for violation of the criminal laws of the country in which they are stationed. This method of procedure would be justified in extreme cases, *e.g.*, plotting against the government. In ordinary cases, however, the mere revocation of the exequatur will suffice and is preferable.<sup>2</sup>

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<sup>1</sup>"Law Courts in China," *Case and Comment*, XXIV, 956-961 (May, 1918).  
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<sup>2</sup>*In re Dillon*, 7 Fed. Cas. 710; Moore, *Digest of Internat. Law*, V, 78 ff.

<sup>3</sup>7 Op. U. S. Atty-Gen., 367, cited in Moore, *ibid.*, V, 70.

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## CHAPTER XXI

### THE POWER OF RECOGNITION

UNDER the rules of international law, various situations may arise which give occasion for the exercise by a state of the power of recognition. A state which was formerly one may, on its own volition, break apart and form two or more states by a peaceful revolution; or, on the other hand, several separate states may merge into a single state. An insurrection may break out in a state, and a colony or dependency, or some other portion of that state, may, by force of arms, endeavor to establish its independence. Again, a state may change its form of government, *e.g.*, from a monarchy to a republic, thereby altering the authority with which foreign governments must treat in dealing with it. Any and all of these changes may be taken note of by existing members of the family of nations through the exercise of the power of recognizing the *de facto* or *de jure* independence, the belligerency or insurgency of new states, or changes of government in established states.

The Constitution of the United States is silent upon the location, among the organs of government, of the power of recognition. The general practice of nations, however, indicates that this power rests in that organ of government which is vested with the conduct of foreign relations.<sup>1</sup> As indicated, furthermore, by international practice, the modes of recognition fall, in general, into two groups, namely,

<sup>1</sup> Wilson, *Handbook of International Law*, 26.

those which are direct or express and those which are implied. Where recognition is accorded solely by the method of express declaration, such declaration, although addressed to the recognized state, can be communicated only by the indirect method, since, hypothetically at all events, diplomatic relations with the state in question are still non-existent.<sup>1</sup> In 1903 the United States expressly recognized by treaty the independence of Panama. In this case, however, we had already impliedly recognized the new republic by entering into diplomatic relations with it.<sup>2</sup> Recognition of belligerency or of insurgency may be accorded by the issuance of a proclamation of neutrality. Thus, President Cleveland by a proclamation issued in 1895, recognized the existence of an insurrection in Cuba.<sup>3</sup> Great Britain similarly recognized the belligerency of the Confederacy in May, 1861.<sup>4</sup>

The more usual method of recognition, however, has been that of necessary implication arising from other acts, such as sending and receiving diplomatic representatives and entering into conventional relations. Hence it is not necessary that there should be, in the Constitution, any express grant of the power of recognition to any particular organ of the government; this power may be exercised incidentally by the appropriate organ in connection with the exercise of express constitutional powers.

<sup>1</sup> Thus in a proclamation of April 22, 1884, Secretary Freylinghuysen effectually recognized the newly established Congo Free State by providing for an official salute to its flag. Sen. doc. 40, 54th Cong., 2nd sess., p. 11.

<sup>2</sup> In receiving a minister from Panama, President Roosevelt, however, used language expressly recognizing the independence of that republic, although such recognition would have been implied from the mere act of receiving him. *For. Rels. of U. S.*, 1903, p. 245.

<sup>3</sup> Richardson, *Mess. and Pap. of the Presidents*, IX, 591. Cf. *The Three Friends*, 166 U. S., 1, in which the court followed the President in recognizing a state of insurgency, as distinguished from belligerency, in Cuba.

<sup>4</sup> Since President Lincoln had previously proclaimed a blockade of the Confederate ports, the British action was justifiable from the standpoint of international law. When, however, in 1867, an insurrection broke out in Abyssinia, a resolution was introduced in the Senate providing for a declaration of our neutrality between the king of that country and Great Britain. Cong. Globe, 40th Cong., 1st sess., Nov. 29, 1867, p. 810.

## CONGRESSIONAL INFLUENCE UPON RECOGNITION

It has sometimes been asserted that Congress has a concurrent power to accord recognition, and the executive department has occasionally shown a disposition to concede to that body some influence in this field. The question came up prominently during Monroe's administrations in connection with the proposal to recognize the South American states which had revolted from Spain. Before the President took definite action in the matter, Henry Clay, Speaker of the House of Representatives, sought, in 1818, to secure an amendment to an appropriation bill authorizing the expenditure of a certain sum "for one year's salary and an outfit to a minister" to the South American provinces.<sup>1</sup> As originally introduced, the amendment described these provinces as "the independent provinces of the River Plata." This wording, however, was shortly afterwards changed so as to make the appropriation for the minister to the "United Provinces of the Rio de la Plata, whenever the President shall deem it expedient to send a minister" thereto.<sup>2</sup> The amendment was not adopted, but, in 1821, the House passed a resolution proposed by Clay which provided that that body would "give its constitutional support to the President whenever he may deem it expedient to recognize the sovereignty and independence of any of the said provinces."<sup>3</sup> In the following year the President sent a message to Congress expressing the opinion that the provinces ought to be recognized and requesting the coöperation of the legislative branch.<sup>4</sup> In response, Congress appropriated a sum of money to defray the expenses of "such missions to the independent nations on the American continent as the President may deem proper."<sup>5</sup> The passage of this act, however, did not of itself constitute a recognition

<sup>1</sup> Annals of Cong., 15th Cong., 1st sess., II, 1468.

<sup>2</sup> *Ibid.*, 1500.

<sup>3</sup> Annals of Cong., 16th Cong., 2nd sess.

<sup>4</sup> Richardson, *Mess. and Pap. of the Presidents*, II, 117.

<sup>5</sup> Annals, 17th Cong., 1st sess., II, app., 2603.

of any particular states, since discretion in the matter remained to the President.<sup>1</sup> The actual recognition was then extended by the President, by sending and receiving diplomatic representatives from the various South American republics.

During the debate on the recognition of the former Spanish-American provinces no claim was made that Congress could effect such recognition through an express declaration. But it was argued that recognition could be extended incidentally or indirectly through the exercise of one of the undoubted legislative powers of Congress, such as that of making appropriations. Clay also held on this occasion that this might be done through the exercise by Congress of the power to regulate foreign commerce.<sup>2</sup> Although the power of Congress thus to effect recognition was not admitted by the President, Monroe, by his action, indicated that, in a matter of such importance, the coöperation and support of Congress was desirable, especially since the act of recognition might be considered a *casus belli* by Spain. The incident shows, however, that the power to recognize, as well as the responsibility for recognition, rests with the President.

On other occasions the Executive has seemed to concede to Congress a concurrent power of recognition. In 1836 the Senate and House of Representatives passed resolutions declaring that "the independence of Texas ought to be acknowledged by the United States whenever satisfactory information shall be received that it has in successful operation a civil government capable of performing the

<sup>1</sup> Henry Winter Davis, chairman of the House Committee on Foreign Affairs, maintained in 1864 that this act constituted and completed the recognition of the new nations and that the sending of ministers to some or all of them "was a matter of executive discretion, not at all essential to or connected with the fact of recognition." House rept. 129, 38th Cong., 1st sess., p. 4. This view, however, does not seem to be well founded.

<sup>2</sup> Annals, 15th Cong., 1st sess., II, 1616. Clay maintained the same proposition in 1836 when, as chairman of the Senate Committee on Foreign Relations, he made a report on the recognition of the independence of Texas. Sen. doc. 231, 56th Cong., 2nd sess., part 6, p. 73.

duties and fulfilling the obligations of an independent power.”<sup>1</sup> In December of the same year President Jackson sent a message to Congress on the question of acknowledging the independence of Texas, saying:

“Nor has any deliberate inquiry ever been instituted in Congress or in any of our legislative bodies as to whom belonged the power of originally recognizing a new State—a power the exercise of which is equivalent under some circumstances to a declaration of war; a power nowhere expressly delegated, and only granted in the Constitution as it is necessarily involved in some of the great powers given to Congress, in that given to the President and Senate to form treaties with foreign powers and to appoint ambassadors and other public ministers, and in that conferred upon the President to receive ministers from foreign nations. In the preamble to the resolution of the House of Representatives it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of Congress. In this view, on the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject. It is to be presumed that on no future occasion will a dis-

<sup>1</sup> Debates, 24th Cong., 1st sess., p. 4621. In the Senate the adoption of the resolution was preceded by the submission of a report by Henry Clay from the committee on Foreign Relations, June 18, 1836, in which it was said:

“The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas, with the usual credentials; or, lastly, by the Executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the Executive only is competent to make it. In the first and third modes the concurrence of the Senate, in its executive character, would be necessary; and in the second, in its legislative character. The Senate alone, without the coöperation of some other branch of the Government, is not competent to recognize the existence of any power. The President of the United States, by the Constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgment of the independence of any new power. . . . If, in any instance, the President should be tardy, he may be quickened in the exercise of his power by the expression of the opinion or by other acts of one or both branches of Congress, as was done in relation to the republics formed out of South America. But the committee do not think that on this occasion any tardiness is justly imputable to the Executive.” Sen. doc. 231, 56th Cong., 2nd sess., part 6, pp. 73-74.



pute arise, as none has heretofore occurred, between the Executive and Legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished.”<sup>1</sup>

Congress responded to the President's message by passing an act appropriating money “for the outfit and salary of a diplomatic agent to be sent to the republic of Texas, whenever the President may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such a minister.”<sup>2</sup> Shortly afterwards, President Van Buren recognized Texas by sending to the republic a *chargé d'affaires*. The extent to which the President deferred to Congress in this case in the matter of recognition is rather exceptional. The act passed, however, although indicating financial and moral support of the Executive in the project, can hardly be considered as, of itself, a complete official act of recognition by our Government. The discretion as to when the proposed action should be taken, or whether it should be taken at all, was left by Congress to the President.<sup>3</sup> Moreover, the President could have recognized Texas, had he seen fit to do so, without waiting for the passage of an act or the expression of any opinion on the part of Congress.

In 1849 Secretary Clayton, in his instructions to A. Dudley Mann, the special and confidential agent of the United States in Hungary, seems to have surpassed even President Jackson in conceding to Congress a power of recognition.<sup>4</sup> No actual recognition, however, was accorded

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, III, 267.

<sup>2</sup> 5 Stat. at L., 170.

<sup>3</sup> As confirming this statement, see the message of President McKinley, December 6, 1897, Richardson, *op. cit.*, X, 146.

<sup>4</sup> Secretary Clayton said: “Should the new government prove to be in your opinion firm and stable, the President will cheerfully recommend to Congress,

in that instance, as our emissary reported that the conditions were not propitious for such action.

The next assertion of Congressional power over recognition occurred in 1864, when, as we have seen,<sup>1</sup> the House of Representatives adopted a resolution declaring that "Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters; and it is the constitutional duty of the President to respect that policy," etc.<sup>2</sup> The adoption of the resolution was preceded by the submission of a report from the Committee on Foreign Affairs designed to show that the precedents were in favor of a Congressional power of recognition.<sup>3</sup> In spite of the passage of this resolution, however, President Lincoln kept control of the situation created by the presence of the French in Mexico.

On December 21, 1896, the Senate Committee on Foreign Relations submitted a report recommending the adoption of a joint resolution declaring "that the independence of the Republic of Cuba be, and the same is hereby, acknowledged by the United States of America."<sup>4</sup> On the same day Senator Bacon offered a concurrent resolution declar-

at their next session, the recognition of Hungary; and you might intimate, if you should see fit, that the President would in that event be gratified to receive a diplomatic agent from Hungary in the United States, by or before the next meeting of Congress; and that he entertains no doubt whatever that, in case her new government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body." Senate Ex. doc. 43, 31st Cong., 1st sess., pp. 5-6 (June 18, 1849).

<sup>1</sup> *Supra*, Chap. X.

<sup>2</sup> Cong. Globe, 38th Cong., 2nd sess., Dec. 19, 1864, pp. 48, 66, 67.

<sup>3</sup> House rept. 129, 38th Cong., 1st sess. In this report it is maintained that Hayti and Liberia were first recognized by an act of Congress of July 5, 1862. The provision referred to, however, was a clause in an appropriation bill which merely authorized the President, with the advice and consent of the Senate, to appoint diplomatic representatives to the republics of Hayti and Liberia. The usual proviso stipulating that the recognition should take place whenever the President should deem it expedient did not appear. The act, in itself, did not constitute a full official recognition. The President might have sent such diplomatic representatives, had the act not been passed; on the other hand, he could not have been compelled to exercise the authority which the act purported to confer.

<sup>4</sup> Senate rept. 1160, 54th Cong., 2nd sess., reprinted in Sen. doc. 231, 56th Cong., 2nd sess., part 7, p. 64.

ing that the question of recognition "is one exclusively for the determination of Congress."<sup>1</sup> Recognition of Cuba at that time, however, was opposed by President Cleveland,<sup>2</sup> and President McKinley later adopted the same attitude. In his message of December 6, 1897, the latter said: "I regard the recognition of the belligerency of the Cuban insurgents as now unwise, and therefore inadmissible. Should that step hereafter be deemed wise as a measure of right and duty, the Executive will take it."<sup>3</sup> On January 11, 1897, the results of a thorough investigation of the precedents relating to the power of recognition, made by the Senate Committee on Foreign Relations, were published, and they showed that recognition is distinctly an executive function and that Congress can exercise no influence over it except indirectly. "In the department of international law, properly speaking," it was declared, "a Congressional recognition of belligerency or independence would be a nullity."<sup>4</sup> In view of the attitude of the President and of many members of the Senate, the joint resolution, as finally passed, did not assume, by that method, to confer recognition upon the Cuban republic, but merely recited that "the people of the island of Cuba are, and of right ought to be, free and independent."<sup>5</sup> This was not generally considered at the time as a Congressional recognition of the independence of a new state; and this view subsequently received the sanction of the Supreme Court.<sup>6</sup>

<sup>1</sup>The full text of the Bacon resolution was as follows: "The question of the recognition by this Government of any people as a free and independent nation is one exclusively for the determination of Congress in its capacity as the law-making power; this prerogative of sovereign power does not appertain to the Executive department of the Government except in so far as the President is, under the Constitution, by the exercise of the veto, made a part of the law-making power of the Government." Congressional Record, December 21, 1896, vol. 29, p. 357. The resolution was referred to the Committee on the Judiciary, from which it seems never to have emerged.

<sup>2</sup>Richardson, *Mess. and Pap. of the Presidents*, IX, 719.

<sup>3</sup>Richardson, *op. cit.*, X, 134.

<sup>4</sup>Senate doc. 56, 54th Cong., 2nd sess. The conclusions presented are reprinted in Corwin, *President's Control of Foreign Relations*, 79-80.

<sup>5</sup>30 Stat. at L., 738 (April 20, 1898).

<sup>6</sup>*Neely v. Henkel*, 180 U. S., 124-5, where it was said: "The contention that the United States recognized the existence of an established government

## EXECUTIVE CONTROL OVER RECOGNITION

The Constitution, as we have seen, does not expressly confer the power of recognition upon any organ of the Government. But, in determining the location of this power, we may assume as a general principle that "all duties in connection with foreign relations not otherwise specified fall within the sphere of the executive."<sup>1</sup> Moreover, the investment in the President of the power of recognition may be inferred from the expressly granted powers of appointing and receiving diplomatic representatives and of participating in the making of treaties, and from the general grant of executive power. In appointing diplomatic representatives and in entering into international agreements, the President usually acts in conjunction with the Senate; and, to that extent, the Senate may participate in the exercise of the power of recognition. But the President may, and frequently does, send diplomatic agents and enter into international agreements without consulting the Senate.<sup>2</sup> Even in appointing regular diplomatic representatives, the President takes the initiative and, moreover, may sometimes make the appointment during the recess of the Senate and thus complete, on his sole authority, the act of recognition even though the Senate, at its next session, fails to confirm the appointment.<sup>3</sup> Furthermore, when

known as the Republic of Cuba. . . is without merit. The declaration by Congress that the people of Cuba were and of right ought to be free and independent was not intended as the recognition of the existence of an organized government instituted by the people of that Island in hostility to the government maintained by Spain. . . . Both the legislative and executive branches of the government concurred in not recognizing the existence of any such government as the Republic of Cuba." (1901.)

<sup>1</sup> Sen. doc. 56, 54th Cong., 2nd sess., p. 18.

<sup>2</sup> The sending of a mere Presidential agent need not be considered as amounting to an act of recognition, certainly not to recognition of *de jure* independence. It may, however, be tantamount to a recognition of a *de facto* government. Thus President Wilson, although refusing to recognize the Huerta régime as the *de jure* Government of Mexico, recognized it as the *de facto* Government by sending special Presidential agents to it.

<sup>3</sup> In this case "the necessity for a later confirmation of the appointment would not operate as a delay of recognition, nor would a refusal to confirm amount to a withdrawal of recognition—it would merely require an appointment agreeable to the Senate." C. A. Berdahl, "The Power of Recognition,"

the President performs the act of recognition by receiving a foreign minister, or by granting an exequatur to a foreign consul, there is no question that the function belongs exclusively to him.<sup>1</sup>

Recognition through receiving a foreign minister is the customary, regular, and most proper method. It is the most proper method because, ordinarily, the application for recognition should come from the new state or government. This was the method pursued in 1793, on the first occasion when we granted recognition to a foreign government; President Washington received M. Genet as the minister to the United States from the French Republic.<sup>2</sup> As has been pointed out, "the power to receive public ministers, which is confided in the President alone, implies the power to decide who should be received. And this implies the power to examine their credentials and ascertain whether the foreign potentates, by whom the credentials are made out, are, in fact, sovereigns."<sup>3</sup>

The predominating and controlling position of the President in the matter of recognition rests fundamentally upon the fact, as we have seen, that that official is the sole medium

*Am. Jour. Internat. Law*, XIV, 525 n. Moreover, as was pointed out in the Senate document, previously cited, where the President and Senate participate in recognizing a new state by sending a diplomatic representative thereto, no previous legislation by Congress is necessary, "as the envoy would be an officer whose position is established by the Constitution itself, and who could either give his services gratuitously or be reimbursed out of a contingent fund, as was done in the case of President Monroe's South American commissioners in 1818." Sen. doc. 56, p. 29.

<sup>1</sup>Recognition was extended by the President through the issuance of an exequatur in the cases of Guatemala, Uruguay, Venezuela, and New Granada. Senate doc. 40, 54th Cong., 2nd sess., pp. 11, 13.

<sup>2</sup>Sen. doc. 40, cited above, p. 2.

<sup>3</sup>Senate doc. 56, cited above, p. 19. As showing how far some of the predictions of the framers of the Constitution fell short, it is interesting to note Hamilton's assertion in the *Federalist* (No. 69) that the President's power to receive ambassadors and other public ministers "is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government." Hamilton very soon realized his mistake, for in the first of the series of letters signed "Pacificus" and dated June 29, 1793, he declared that the right of the President to receive ambassadors and other public ministers "includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized or not." *Works* (Lodge ed.), IV, 144.

of communication between the United States and foreign governments.<sup>1</sup> In consequence, it is an established rule that diplomatic representatives of foreign governments—and the same is true of our own diplomats—hold direct communication with the executive branch of the Government, and not with Congress. Therefore, even if Congress had a power of recognition, it could exercise it only in an indirect and roundabout manner.<sup>2</sup> Moreover, the President is better qualified than Congress to determine whether recognition should be accorded, because he is ordinarily in possession of fuller and more authentic information as to the facts of the situation. Recognition of a *de facto* government, as has been pointed out, “is in law the recognition of a fact. This fact is the existence of a politically organized community having an established seat of government, enforcing obedience to its mandates within its limits in a civilized and orderly manner, and asserting its independence, with a reasonable chance of being able to make good its assertion.”<sup>3</sup>

These are questions of fact which, as a rule, the President alone is able to decide upon a sufficient basis of information. Moreover, if he does not have the necessary information, he can secure it by sending special Presidential agents for that purpose. This was done, for example, in 1849, when the President sent A. Dudley Mann as a special and confidential agent to inquire into the prospects of Hungarian independence; as a result of his unfavorable report, recognition was not accorded. The same procedure was adopted by President Monroe in 1817, when he sent commissioners to South America to inquire into the ability of the revolted Spanish provinces to establish their independence. Again, in 1836 President Jackson sent an agent to Texas to investigate conditions with a view to the recognition of that re-

<sup>1</sup> *Supra*, Chap. X.

<sup>2</sup> Cf. Corwin, *President's Control of Foreign Relations*, 82.

<sup>3</sup> E. Maxey, “Legal Aspects of the Panama Situation,” *Yale Law Jour.*, XIII, 85 (Dec., 1903).

public if the situation warranted it. Upon information secured in this way, the President, in all of these cases, based his action. Congress could not have acted with sufficient information, except in so far as it might have been voluntarily transmitted by the President. "Where knowledge is not granted, responsibility is absolved. Recognition, therefore, necessarily implies previous lawful command of all official sources of information by the department of government charged with the duty of decision."<sup>1</sup>

That the President is in practically exclusive control of the power of recognition, except when the Senate may participate in the making of treaties or appointments, is farther indicated by recent practice. The policy whereby the infant republic of Panama was somewhat hastily recognized shortly after the insurrection of 1903 was adopted and carried out by President Roosevelt and Secretary Hay.<sup>2</sup> President Wilson conceived and put into execution his own theory as to the policy which our Government should pursue in recognizing rapidly shifting Latin American governments. In his address of September 2, 1916, accepting his renomination, he said: "So long as the power of recognition rests with me, the Government of the United States will refuse to extend the hand of welcome to anyone who obtains power in a sister republic by treachery and violence." It was in pursuance of this policy that he refused to recognize Huerta in Mexico and finally brought about his downfall. It was also by the sole policy and action of the President that the Government of Carranza was recognized, first as the *de facto*, and later as the *de jure*, Government of that country.<sup>3</sup>

<sup>1</sup> Judge W. L. Penfield (Solicitor of the State Department), "Recognition of a New State—Is It an Executive Function?" *American Law Review*, XXXII, 406 (1898).

<sup>2</sup> Latané, *America as a World Power*, 215-220.

<sup>3</sup> The same statement may be made with reference to the recognition of Czecho-Slovakia in 1918. A Congressional attempt to interfere in the President's exclusive control over recognition was made when, on December 3, 1919, Senator Fall introduced a concurrent resolution providing that "the President be and he is hereby requested to withdraw from Venustiano Carranza the rec-

It may be objected that the practice which puts the power of recognition exclusively in the hands of the executive is dangerous, in that it assigns to one man too much discretion in making decisions which may vitally affect the peace and safety of the nation. It is true that the action of our Government in according recognition to a new state may be regarded as a *casus belli* by some third power. But the exercise of other powers granted to the President by the Constitution or established in practice as belonging exclusively to him may involve the nation in similar hazards. This circumstance does not reduce the extent of the power; but it strongly suggests that "it is most advisable as well as proper for the Executive first to consult the legislative branch as to its wishes and postpone its own action if not assured of legislative approval."<sup>1</sup> The power and the responsibility, nevertheless, remain with the President, who may give to expressions of opinion on the part of Congress such weight as they seem to him to deserve.<sup>2</sup>

#### THE COURTS AND RECOGNITION

The conclusions reached above on the location of the power of recognition are confirmed by the testimony of the

ognition heretofore accorded him by the United States as President of the Republic of Mexico and to sever all diplomatic relations now existing between this Government and the pretended government of Carranza." Congressional Record, vol. 59, p. 73. The resolution was referred to the Committee on Foreign Relations, but was never reported out, for a few days later President Wilson wrote Senator Fall a letter in which he said: "I should be gravely concerned to see any such resolution pass the Congress. It would constitute a reversal of our constitutional practice, which might lead to very great confusion in regard to the guidance of our foreign affairs. I am convinced that I am supported by every competent constitutional authority in the statement that the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive, and to the Executive only." *New York Times*, December 9, 1919.

<sup>1</sup> Senate doc. 56, p. 2.

<sup>2</sup> Judge Penfield, in the article previously quoted, raises, without deciding, the question as to whether or not Congress is competent, by a two-thirds vote over the President's veto, in the legitimate exercise of the legislative power, to enact a statute having the indirect, but decisive and conclusive effect of granting recognition (*Am. Law Review*, XXXII, 408). As Congress has never attempted to exercise such a power, the probabilities would seem to be against its existence.



courts. It is true that, in several cases, the judicial tribunals have apparently conceded the power of recognition to the political departments of the Government, including both the legislature and the executive. Thus a few years ago the Supreme Court declared that "what is the *de jure* government of a country is a strictly political and not a judicial question and the determination of the question by the executive and legislative departments of the recognizing country gives the courts of the latter judicial notice of the recognition."<sup>1</sup> In other cases, however, the executive department has been distinctly indicated as that to which the power of recognition belongs. Thus in an early case Marshall, on circuit, said: "Before a nation could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations."<sup>2</sup> In 1852 Chief Justice Taney declared that the question whether Texas was or was not an independent state "was a question for that department of our government exclusively which is charged with our foreign relations," and the context shows that he meant the executive department.<sup>3</sup> In the case of the *Itata*, decided in 1893, the circuit court of appeals held that "the law is well settled that it is the duty of the courts to regard the status of the [Chilean] Congressional party in the same light as they were regarded by the executive department of the United States at the time the alleged offenses were committed."<sup>4</sup> It is well settled that the courts will take judicial notice of recognition accorded by the President, and in a recent case the Supreme Court declared that the decision of the President in recognizing

<sup>1</sup> *Pearcy v. Stranahan*, 205 U. S., 257.

<sup>2</sup> *United States v. Hutchings*, 26 Fed. Cas. 440; Fed. Cas. No. 15,429 (1817). In *United States v. Palmer*, however, decided about the same time, Chief Justice Marshall referred to the power as vested in both of the political departments (2 Wh., 643).

<sup>3</sup> *Kennett v. Chambers*, 14 How., 50.

<sup>4</sup> 56 Fed. 510. Cf. *U. S. v. Trumbull*, 48 Fed., 104; *Williams v. Suffolk Insurance Co.*, 13 Pet., 415; *Jones v. United States*, 137 U. S., 202.

the Government of Carranza as the *de facto*, and later as the *de jure*, Government of Mexico "binds the judges as well as all the other officers and citizens of the government."<sup>1</sup>

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<sup>1</sup> *Ricaud v. American Metal Co.*, 246 U. S., 304 (1918). Cf. *Oetjen v. Central Leather Co.*, 246 U. S., 297; and see E. D. Dickinson, "International Recognition and the National Courts," *Michigan Law Rev.*, XVIII, 531-535 (April, 1920).

## CHAPTER XXII

### THE TREATY-MAKING POWER: GENERAL PRINCIPLES

IT has been maintained that the Government of the United States, even in the absence of any constitutional provision on the subject, would have the power to make treaties, possessing it as an independent member of the family of nations and "as an attribute to sovereignty."<sup>1</sup> In view, however, of the existence of a direct constitutional provision on the subject, it is unnecessary to pass upon the question as to the inherence in our Government of such an extra-constitutional power. The one provision of the Constitution relating to the making of treaties is as follows: "He [The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."<sup>2</sup> It is significant that this provision is found in the article dealing with the executive rather than in that devoted to the legislative branch. It was considered, however, that treaty-making is neither wholly executive nor legislative in character, but is a distinct and composite function, in which the executive and legislative branches should alike participate.<sup>3</sup>

### THE TREATY CLAUSE IN THE CONSTITUTIONAL CONVENTION

During the proceedings of the Federal Convention the Senate was, at first, given full control of treaty-making,

<sup>1</sup> Butler, *Treaty-Making Power of the U. S.*, I, 5.

<sup>2</sup> Art. II, sect. 2, cl. 2.

<sup>3</sup> *Federalist*, No. 75. This idea was strengthened by the general favor with which the principle of checks and balances was received.

though near the close of the deliberations this arrangement was modified so as to associate the President and Senate together in the performance of that work. Several influences led many members to favor intrusting the treaty-making power to the Senate rather than to the executive. These were: (1) fear of the autocratic power which might result from placing this important function in the hands of one man; (2) a desire to depart from English precedent; (3) the force of practice under the preceding régime, when, for lack of a president, the Continental and Confederate Congresses had directed the foreign relations of the country, including the work of treaty-making;<sup>1</sup> and (4) the feeling that, since the states were prohibited from making treaties, some compensation should be granted them by giving this power to their representatives in the upper house, thereby protecting them against injury at the hands of the federal government in its control over foreign relations. So strong were these influences that, during a considerable portion of the session of the convention, the power of making treaties was assigned exclusively to the Senate,<sup>2</sup> as was also the power of appointing ambassadors. Had these proposals been finally adopted, they would very largely have taken away from the executive the control of foreign relations. They were opposed, however, by some of the leading men in the convention. Madison observed that "the Senate represented the states alone, and for this as well as for other obvious reasons, it was proper that the President should be an agent in treaties."<sup>3</sup> With reference to the proposal that the upper house should appoint ambassadors, "Gouverneur Morris argued against the appointment of officers by the Senate. He considered that body as too numerous for the purpose; as subject to cabal; and as devoid

<sup>1</sup> It is of course true that these Congresses exercised both legislative and executive powers, but they were primarily legislative bodies.

<sup>2</sup> Cf. Pinckney to J. Q. Adams, Dec. 30, 1818, Farrand, *Records of the Federal Convention*, III, 427. See also *ibid.*, II, 169, 183.

<sup>3</sup> Farrand, *op. cit.*, II, 392.

of responsibility.”<sup>1</sup> These arguments prevailed, and, as finally decided, the President and Senate are associated together in both the treaty-making and appointing powers. This outcome was doubtless influenced, too, by the consideration that in this way the exercise of these powers would be subjected to the principle of checks and balances.

An attempt was made near the close of the Convention to associate the House of Representatives in the treaty-making power, on the ground that “as treaties are to have the operation of laws, they ought to have the sanction of laws also.”<sup>2</sup> This proposal was defeated, however, on the ground that “the necessity of secrecy in the case of treaties forbade a reference of them to the whole legislature.”<sup>3</sup> Madison also suggested the inconvenience of requiring a legal ratification of treaties of alliance.<sup>4</sup>

It was not apparently thought by the members of the convention that the association of the Senate with the President would substantially impair the requirement of secrecy. This confidence was expressed, and the conditions necessary for success in foreign negotiations were admirably stated, by President Washington several years later in his message to the House of Representatives on the Jay treaty, as follows:

“The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

<sup>1</sup> Farrand, *Records of the Federal Convention*, II, 389.

<sup>2</sup> Wilson of Pa., in Farrand, II, 538.

<sup>3</sup> Sherman of Conn., *ibid.*

<sup>4</sup> *Ibid.*, II, 392. The fact that the term of senators is three times as long as that of members of the lower house, enabling the Senate to give more continuous attention to foreign affairs and to adopt and maintain a more consistent foreign policy, constitutes an additional reason why the Senate alone should be associated with the President in treaty-making.

'The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members.'<sup>1</sup>

The expectation of the framers of the Constitution was that the Senate, as a comparatively small body, would act with the President as an executive council for the purpose of making treaties and confirming appointments to important offices. It is worthy of note, however, that the association of the Senate with the President for these purposes was not in both cases provided for in the same language. In the case of appointments, it is provided that the President "shall nominate, and by and with the advice and consent of the Senate shall appoint," etc.<sup>2</sup> It is thus implied that the President has the sole right of nomination, and that the advice and consent of the Senate operate only upon the confirmation of the appointment, although the President must still issue the commission in order to complete the process. On the other hand, the treaty-making clause provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."<sup>3</sup> It does not say that the President shall negotiate, and by and with the advice and consent of the Senate shall ratify, treaties; the advice and consent of the Senate apparently operate upon the whole process of treaty-making, including negotiation and ratification. It appears, however, from contemporary expositions of this clause that the Senate was not intended to have an equal and coördinate share with the President in the actual business of negotiation. Thus, in the *Federalist*, Jay points out that

"It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, I, 194.<sup>5</sup>

<sup>2</sup> Art. II, sect. 2, par. 2.

<sup>3</sup> *Ibid.*

*dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. . . . There doubtless are many . . . who would rely on the secrecy of the President, but who would not confide in that of the Senate and still less in that of a large popular assembly. The convention has done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.”<sup>1</sup>

This idea was seconded by Hamilton in another number of the *Federalist*, where he says:

“The qualities elsewhere detailed, as indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole, or a portion of the legislative body in the office of making them.”<sup>2</sup>

#### STAGES IN THE PROCESS OF TREATY-MAKING

In considering the relative influence and control wielded by the President and the Senate in treaty-making, it is desirable to bear in mind the various steps or stages commonly followed in the process of making treaties. As a rule, there are four distinct steps: (1) negotiation, including the advice and consent of the Senate to ratification; (2) ratification; (3) exchange of ratifications; and (4) proclamation. Treaties are proclaimed by the President and are published in the *Statutes at Large* as a means of officially acquainting the people with their texts, which forthwith become parts of the supreme law of the land. Such proclamation, however, has no direct bearing on foreign relations and is not neces-

<sup>1</sup> *Federalist*, No. 64.

<sup>2</sup> *Ibid.*, No. 75.

sary to the validity of a treaty in international law.<sup>1</sup> The function of the Senate in treaty-making is popularly spoken of as ratification. But this is an error. The advice and consent of the Senate is a necessary prerequisite to the ratification of a treaty; the act of ratification itself is performed by the President (or his agents), as is also the exchange of ratifications with the representative of the foreign government.<sup>2</sup> In reality, therefore, the President alone fully controls the last three steps,<sup>3</sup> and he and the Senate are associated together in the first step only, *i.e.*, negotiation. This limitation of the Senate's authority to the first stage is not expressly set up by the Constitution, but is brought about in part through international usage and diplomatic practice in treaty-making, and in part through the implications of certain provisions of the Constitution, other than the treaty-making clause, which combine to make the President the spokesman of the nation in foreign relations. These causes, in turn, rest upon fundamental differences in organization between the executive and the legislature, or the upper branch thereof.

It should be noted, however, that treaties sometimes contain a provision which purports to place a limit upon the time within which they may be ratified and the ratifications may be exchanged. If this limit is not observed, it is the usual, though not invariable, practice to secure the consent of the Senate to an extension of the period. Instructions to American diplomatic officers charged with the negotiation of treaties are to the effect that ratification should be

<sup>1</sup> The issuance of the proclamation is a mere ministerial act which follows as a matter of course after the first three stages have been completed, although it is not compellable by mandamus.

<sup>2</sup> The fact that the President ratifies treaties is often lost sight of even by writers on international law. Thus, A. S. Hershey says: "Of course there has never been any question of the right to refuse ratification in the case of States in which, like the United States, the power of negotiation and ratification are in different hands." *Essentials of International Public Law*, p. 315, n. 16.

<sup>3</sup> Except, of course, that the consent of the foreign government must be had to the exchange of ratifications.



promised, not within a given time, but only as soon as possible. This rule has been usually, though not invariably, followed.<sup>1</sup>

It might be thought, at first sight, that since it would manifestly be a usurpation of power for the Senate to engage in the conduct of diplomatic correspondence, that body can not participate with the President in the negotiation of a treaty. If by negotiation we mean the actual conduct of *pourparlers* between the representatives of the two governments, this is true. It was in this narrow sense that Senator Spooner used the term when, in his debate in the Senate with Senator Bacon in 1906, he said: "From the foundation of the government, it has been conceded in practice and in theory that the Constitution vests the power of negotiation . . . exclusively in the President."<sup>2</sup> Senator Bacon admitted that "undoubtedly the power to negotiate within that narrow limit is one which can only be exercised by the President, because he alone under this clause can have direct communication with the foreign power." But the term negotiation may be used in a broader sense, as embracing all acts of the proper governmental authorities from the initiation of the project of a treaty until its ratification by the President. In this sense the term "negotiation" is practically equivalent to the "making" of treaties, and it embraces not only the *pourparlers* incident to the framing of the terms but also the action of the Senate in advising and consenting to ratification. In this broader sense the process of negotiating a treaty may be divided

<sup>1</sup> Cf. Crandall, *Treaty Making Power*, 89-92. An attempt was made by Senator Brandegee to amend the Senate resolution advising and consenting to the ratification of the treaty of peace with Germany by requiring that, as a part and condition of the resolution of ratification, the instrument of ratification should be deposited within ninety days after the adoption of the resolution by the Senate. The amendment was rejected, however, by a vote of 41 to 42. See Congressional Record, March 19, 1920, vol. 59, pp. 4890, 4895. This proposed amendment raised the question whether the Senate's power of suggesting amendments should not properly be limited to the substance of the treaty so as not to extend to an attempted control over the discretion of the President in matters of procedure connected with putting the treaty into effect.

<sup>2</sup> Quoted in Corwin, *President's Control of Foreign Relations*, 170-1.

into two stages or sets of operations, the first extending from the initiation of the project up to the act of attaching their signatures by the representatives of the contracting parties; the second extending from this step to ratification by the President. The first stage may be called preliminary negotiations, and the second, especially if the Senate proposes amendments, may be termed supplementary negotiations.

There are two views as to the rights of the Senate in treaty-making. The first is that the rights of that body extend to both of the two stages as described above; the second is that these rights are restricted to the second of the two stages. The first view was supported by Senator Bacon in his debate with Senator Spooner in 1906. The functions of the Senate, he maintained, are not confined merely to answering 'yes' or 'no' to the proposition submitted by the President. "On the contrary . . . in the making of treaties it is proper for the Senate to advise at all stages. . . . We do not advise men after they have made up their minds and after they have acted; we advise men while they are considering, while they are deliberating, and before they have determined and before they have acted."<sup>1</sup> The same view was taken by Senator La Follette in the debate in the Senate in 1919 on the Treaty of Versailles. "It is idle," he declared, "to say that the Constitution means that the President should advise with the Senate after the treaty has been put in final form, and has been duly signed by the accredited delegates to the peace conference."<sup>2</sup>

On the other hand, it has been held that the Senate can participate in the negotiations only after the signature of the treaty, which, until ratified by the President, is still technically a mere project. Thus, Senator Lodge says: "The right of the Senate to amend has always been freely

<sup>1</sup> *Op. cit.*, p. 181; *North American Review*, CLXXXII, 506.

<sup>2</sup> *Cong. Record*, Nov. 6, 1919, vol. 53, p. 8481.

used at all periods of our history and of course will continue to be exercised, because it is the only method by which the Senate can take part in the negotiations, as the Constitution intended it to do.”<sup>1</sup> That the action of the Senate in passing on a treaty submitted to it by the President may be considered as one phase of the negotiation of the treaty is also maintained by other authorities. Thus, Senator Bacon, in the debate referred to, put the following rhetorical question: “When the Senate has amended a proposed treaty and the President thereafter submits the amendment to the foreign power for its consideration, has not the Senate taken part in the negotiation of that treaty?”<sup>2</sup> This point of view is clearly taken by John W. Foster in his “Practice of Diplomacy”:

“While,” he says, “the negotiation of treaties is conducted by or under the direction of the secretary of state, such negotiation cannot properly be said to be concluded until the ‘advice of the senate’ is obtained, which, as noted, is sometimes secured in advance, but usually not until the treaty is submitted to the Senate for ratification. That body being made by the Constitution a part of the treaty-making power, the amendments which it may see proper to submit for the consideration of the foreign government which is a party to the proposed treaty are as much a stage of the negotiations as the preceding action of the secretary of state.”<sup>3</sup>

In reality, there is no necessary conflict between the apparently opposing views here presented. One group of writers are speaking of practical influence, while the other have in mind rather legal control. The Senate may exercise influence through its advice at all stages in the process of treaty-making. As a rule, however, the more important power of the Senate is not the giving of advice, but the granting or withholding of consent. The advice of the

<sup>1</sup> *Scribner's Magazine*, XXXIV, 548. Cf. the statement of the same writer, *ibid.*, XXXI, 41: “Senate amendments are simply a continuance of the negotiation begun by the President.”

<sup>2</sup> Corwin, *op. cit.*, 189.

<sup>3</sup> *Op. cit.*, 276-7.

Senate is not, of itself, more weighty than would be that of any other body similarly constituted. But such advice derives weight from the fact that the Senate's consent must be secured before a treaty can be completed. The Senate may tender its advice before the conclusion of the treaty, and the President may or may not be influenced by it.<sup>1</sup> The Senate's function in consenting to a proposed treaty or in withholding its consent, however, must be respected by the President;<sup>2</sup> for the action of the Senate in this matter has, of course, a legal effect upon the validity of the treaty. From the legal point of view, therefore, the Senate can exercise control through its consent or non-consent during the supplementary negotiations only. But from the practical point of view it may happen that the advice of the Senate, even when tendered during the preliminary negotiations has controlling weight.

Such practical control may operate either positively or negatively. If the fact that the Senate was not consulted during the preliminary negotiations has an appreciable effect in inducing that body to reject a treaty—or to propose unacceptable amendments, whereas it would otherwise have approved without such amendments—it may reasonably be maintained that some practical control, even though indirect, is exercised by the Senate over the first stage in the process of negotiation. The power of the Senate to reject a treaty, or to propose amendments thereto after the instrument has been submitted to that body, may thus enable it to exert a retroactive control to a certain degree over the preliminary negotiations.

<sup>1</sup>As was said in a Senate report: "The initiative lies with the President. He can negotiate such treaties as may seem to him wise, and propose them to the Senate for the advice and consent of that body, which is as free and independent in its action upon the same as the President is in exercising his power of initiation and negotiation. . . . Whether he will negotiate a treaty and when and what its terms shall be, are matters committed by the Constitution entirely to the discretion of the President." Rept. of Senate Foreign Relations Committee, Dec. 15, 1902, Senate doc. 47, 57th Cong., 2d sess., p. 2.

<sup>2</sup>President Roosevelt, however, carried through by executive action an agreement with Santo Domingo, whose substance had been rejected by the Senate when embodied in treaty form.

## PRECEDENTS ESTABLISHED BY WASHINGTON

These considerations indicate that (as Jefferson, while Secretary of State, advised President Washington), since the approval of the Senate must finally be secured, that body should, where not incompatible with public interests, be consulted before the opening of negotiations.<sup>1</sup> Washington followed this advice, and from the practice of his administrations farther light may be obtained upon the interpretation of the treaty-making clause with reference to the control of negotiation. At the outset of his first administration Washington evidently considered it desirable to secure the sanction or approval of the Senate during the stage of treaty-making pertaining to the preliminaries of negotiation. He also deemed it expedient that this approval should be secured by oral, rather than by written, communication. Therefore in 1789, less than four months after his inauguration, he appeared in the chamber of the Senate, pursuant to notice, "to advise with them on the terms of the treaty to be negotiated with the Southern Indians."<sup>2</sup> It will be noted that this was not a treaty which had been negotiated, and for whose ratification the President desired the advice and consent of the Senate, but was, rather, a mere project of a treaty which was still to be negotiated. In other words, the President was consulting the Senate, through personal interview, in order to secure its advice while the negotiations were still incomplete, and indeed not even begun.<sup>3</sup>

Washington's reasons and motives in consulting with the Senate in person in regard to treaties were stated by himself as follows:

<sup>1</sup> *Jefferson's Writings* (Ford ed.), V, 442. From this it follows that the Senate should also be consulted during negotiations.

<sup>2</sup> 1 *Annals of Cong.*, Col. 67: 1 *Executive Journal*, 20.

<sup>3</sup> They had probably not yet begun, since the commissioners nominated by the President to negotiate the treaty had only a day or two before been confirmed by the Senate. 1 *Annals of Cong.*, Cols. 65 and 67.

"In all matters respecting treaties, oral communications seem indispensably necessary, because in these a variety of matters are contained, all of which not only require consideration, but some may undergo much discussion, to do which by written communications would be tedious without being satisfactory."<sup>1</sup>

The question naturally arises why, if Washington considered oral communications so superior to written ones in consulting the Senate in treaty-making, he did not again make use of that method during his administrations, and why no subsequent President ever appeared in the Senate chamber to communicate with that body in regard to a treaty until the time of Wilson, and then only for the purpose of delivering a formal address.<sup>2</sup> The reason assigned is that Washington found his one experience unsatisfactory and therefore did not repeat it. But in what particular, or on what ground, he found it unsatisfactory is not usually specified.

The explanation is to be found in an incident which occurred during the President's first visit to the Senate. A written statement was read to the Senate containing a recital of facts, together with seven questions regarding the terms of the treaty on which advice and consent was asked. After two of these questions had been put, Senator Maclay of Pennsylvania moved that the matter be referred to a committee.<sup>3</sup> Thereupon, as Maclay records in his journal, the President started up in a violent fret, declaring "this defeats every purpose of my coming here."<sup>4</sup> Nevertheless the motion was carried and the matter was committed.<sup>5</sup> Thus on the first occasion when the question arose, the Senate chose to adopt a course of action which was suitable

<sup>1</sup> *Washington's Writings*, XI, 417; quoted by Foster, *Practice of Dip.*, 264.

<sup>2</sup> See Cong. Record, July 10, 1919. President Wilson had, however, appeared before the Senate on January 22, 1917, and delivered an address on the essential terms of peace.

<sup>3</sup> Maclay's *Journal*, 130.

<sup>4</sup> *Ibid.*, 131. Cf. J. Q. Adams, *Memoirs*, VI, 427.

<sup>5</sup> 1 Ex. Jour., 22, 23.

for a legislative body, but not suitable for an executive council, in which capacity the Senate was intended to act in dealing with treaties. Maclay's reason for making the motion to commit is stated by himself as follows: "Commitment will bring the matter to discussion, at least in the committee, *when he [the President] is not present.*"<sup>1</sup> Thus it was intended that the President should not participate in the real discussion through which the Senate should reach its conclusion, and that he should be present only when the Senate was prepared to answer his questions by categorical answers.

The Senate thus chose to proceed on the theory that in advising and consenting to the ratification of treaties it is acting in its representative capacity, rather than as an executive council.<sup>2</sup> It would seem that, by the adoption of this course, it largely destroyed the possibility of real consultation between it and the President in treaty matters.<sup>3</sup> Although the relations between the President and the Senate were closer, and probably more cordial, in this early period than they have been during most of our national history, evidences are discernible that even at that time a certain jealousy and distrust, and a determination to maintain rigidly their respective powers and prerogatives in treaty-making, were growing up between the President and the Senate. Thus, Maclay remarks, "The President wishes to tread on the necks of the Senate. . . . He wishes us to see with the eyes and hear with the ears of his secretary

<sup>1</sup> Maclay's *Journal*, 131. Italics are mine.

<sup>2</sup> For this course it may find partial justification in the fact that, under the Constitution, treaties, when proclaimed by the President, become part of the law of the land.

<sup>3</sup> As Woodrow Wilson many years later pointed out: "Argument and an unobstructed interchange of views upon a ground of absolute equality are essential parts of the substance of genuine consultation. The Senate, when it closes its doors, upon going into 'executive session,' closes them upon the President as much as upon the rest of the world. He cannot meet their objections to his courses except through the clogged and inadequate channels of a written message or through the friendly but unauthoritative offices of some Senator who may volunteer his active support." *Congressional Government* (Boston, 1885), 233.

only. The secretary to advance the premises, the President to draw the conclusions,\* and to bear down our deliberations with his personal authority and presence. Form only will be left us.”<sup>1</sup>

#### FUNDAMENTAL CONDITIONS OF TREATY-MAKING

The Constitution's framers did not desire to make treaty-making unduly easy.<sup>2</sup> Hence they associated together two independent authorities whose concurrence must be secured before a treaty can be completed. This arrangement almost inevitably gives rise to occasional friction; and even when there is harmony between the President and a majority of the Senate, the two-thirds requirement may enable a minority to block action. These obstacles may be overcome if the political party to which the President belongs controls a large majority in the Senate. Even though this is not the case, they may be overcome at times by cautious and conciliatory action. Thus, Daniel Webster, when Secretary of State, negotiated the Ashburton Treaty, and, by keeping the principal senators informed as to the various steps in the negotiation, was enabled to secure the Senate's advice and consent to ratification, even though the majority of that body was opposed to the President politically.<sup>3</sup>

When, as in treaty-making, the exercise of a power is entrusted to two independent authorities whose concurrence must be secured before the power can be fully brought into play, it follows that the degree of control which each authority can exercise will, within constitutional limits, depend largely upon the efficiency of the two in using their respec-

<sup>1</sup> Maclay's *Journal*, 131.

<sup>2</sup> Cf. Madison in Farrand, *Records of Federal Convention*, II, 548.

<sup>3</sup> J. W. Foster, "The Treaty-Making Power under the Constitution," *Yale Law Journal*, XI, 71 (Dec., 1901). A Secretary of State is more likely to be proficient in conciliating the Senate if he has himself seen service in that body, and it may be that, as Reinsch points out, the fact that, of late years, our Secretaries of State have not usually had previous Senatorial experience, accounts for some of the difficulties encountered in treaty-making. *Am. Legislatures and Legislative Methods*, 95.



tive shares of the power; and inasmuch as such efficiency will vary from time to time, the degree of control which each will wield over the exercise of the power in question will also vary. Since, however, the working efficiency of any governmental agency is largely dependent upon the adaptability of its organization to the purpose in hand, it is possible to arrive at conclusions which will be generally true as to the respective control of the President and Senate in treaty-making.

Although, as already indicated, Washington did not again consult the Senate in person in regard to treaties, he frequently took that body into his confidence through written communications with regard to proposed or pending treaties. But in the case of the most important treaty of his administrations, the Jay Treaty with Great Britain, he does not seem to have followed this practice. After his time the custom of consulting the Senate as a body prior to laying before it the completed draft of a treaty fell into disuse, although occasional recurrences of it may be found.<sup>1</sup> With the admission of new states, the size of the Senate so increased that it became less and less suitable to act as an executive council, even had it desired to do so. As we have seen, the House of Representatives was excluded from participation in the treaty-making power largely because its size would render it practically impossible to secure in all cases that "secrecy and dispatch" which were considered necessary to success in treaty-making. Yet the House of Representatives had at first considerably fewer members than has the Senate at the present time. The question might, therefore, be asked whether, had the Constitution's makers known that the Senate would become as large as it now is, they would have associated it in the treaty-making power. To this question no certain

<sup>1</sup> Thus Presidents Jackson and Polk, in 1830 and 1846 respectively, sought the advice of the Senate on proposed treaties. Other examples are given in Crandall, *op. cit.*, 70-72. Cf. Senator Lodge in *Scribner's Magazine*, XXXI, 39-40 (Jan., 1902).

answer can be given; for considerations—perhaps even more important in the framers' minds—other than the size of the upper house caused it to be associated in the exercise of this power. Nevertheless, the size of the Senate nowadays has some influence towards making that body a deliberate as well as a deliberative institution; so that when quick action is desired, the President may feel that the public interest will be best conserved by not consulting the Senate at all.<sup>1</sup>

As a matter of fact, secrecy is not now considered so highly desirable as formerly, and the Senate has considered some treaties in open executive session. Even, however, when secrecy is admittedly desirable, and when a proposed treaty is considered behind closed doors, substantially accurate accounts of what takes place are frequently published. These facts have doubtless had some weight in causing Presidents to hesitate to ask the advice of the Senate pending negotiations. It is, of course, true that the President does not have to act in accordance with the advice of the Senate when asked and given, although he would hardly fail to do so except for weighty reasons. Moreover, he is likely to feel under some obligation, after having asked the Senate's advice, to wait until he receives a response before taking action which may not be in conformity with the advice given, even though such delay may prove prejudicial to the success of the negotiations. Rather than run the risk of undergoing such inconvenience, the President may refrain from requesting the Senate's advice until the signed draft of the proposed treaty is ready to be laid before that body.

<sup>1</sup> The dilatoriness of the Senate was illustrated when, in Dec., 1861, President Lincoln submitted the project of a treaty with Mexico. Almost three months later a resolution was adopted to the effect that "it is not advisable to negotiate a treaty that will require the United States to assume any portion of the . . . debt of Mexico." Before our minister to Mexico could be apprised of this resolution he, however, had already, in view of the important events occurring there, signed treaties which had been ratified by Mexico, but which contravened the spirit of the Senate resolution. Richardson, *Mess. and Pap. of the Presidents*, VI, 81-2. This was not an extreme case.

Thus, desirable "secrecy and dispatch" in foreign negotiations may be defeated by the size and dilatoriness of the Senate. In so far as they are clearly desirable, the President is the more efficient authority, and control of treaty negotiations therefore tends, to this extent, to gravitate into his hands. These, however, are not the only desirable conditions of the successful conduct of negotiations. Caution and circumspection in weighing the effects of a treaty, both immediate and remote, in relation to the protection of the interests of the whole country are also desirable, and from this point of view the action of the Senate may be more efficient than that of the President.

In giving its advice the Senate does not have to await a request from the President, and instances have occurred in which that body has, on its own initiative, advised the President to open negotiations.<sup>1</sup> Such initiative has also sometimes been taken by act of Congress.<sup>2</sup>

The advice given, however, need not be acted upon; for the President is completely in control of actual negotiations, in the sense of the conduct of *pourparlers* with the representatives of foreign governments.<sup>3</sup> The Senate has no

<sup>1</sup> Thus, by simple resolution of March 3, 1835, adopted in executive session, the Senate requested the President to open negotiations with Central American countries looking toward the construction of an interoceanic canal. H. C. Lodge, in *Scribner's Mag.*, XXXI, 40. Cf. the resolution of March 3, 1888, *ibid.*, p. 42, and see Bigelow, *Breaches of Anglo-American Treaties*, 73. Again, by a Sen. Jt. Res. approved Apr. 8, 1904, the President was requested to negotiate and, if possible, conclude negotiations with Great Britain for a review and revision of the rules and regulations governing the taking of fur seals in the Bering Sea. Cong. Record, vol. 38, p. 4673; House Rept. 2076, 58 C. 2 S.; 33 Stat. at L., pt. 1, p. 586. In suggesting negotiations the Senate does not usually undertake in advance to specify in detail the terms of the treaty to be drafted. But the President may consult with the Senate or with individual Senators informally regarding the details of a treaty. The Senate may also, by resolution, advise the President not to negotiate a particular treaty, or a treaty of a given character, as was done on Feb. 25, 1862; and, if the resolution were passed by more than a two-thirds vote, it would doubtless effectively stop action. Lodge, in *Scribner's Mag.*, XXXI, 37.

<sup>2</sup> Thus by an act approved June 28, 1902, the President was authorized to enter into treaty negotiations with the Republic of Colombia for the purpose of securing control of the Isthmian Canal Zone. 32 Stat. at L., pp. 481-2.

<sup>3</sup> In 1835 President Jackson vetoed an act of Congress on the ground that it was "obviously founded on the assumption that an act of Congress can give power to the Executive or to the head of one of the departments to negotiate

right to conduct diplomatic correspondence, nor is the President the mere ministerial agent of that body in conducting such correspondence. None the less, its advice may be influential in inducing the President to undertake a particular negotiation. Even the House of Representatives may, on its own initiative, advise the President to undertake negotiations.<sup>1</sup> Whatever weight the House of Representatives has in the negotiation of treaties is largely due to its control over appropriations necessary to pay the expenses of the negotiations. This power of the House, however, is not of as much consequence as it might seem, because special appropriations are not usually necessary. Finally, the two branches of Congress, acting as a legislative body, may attempt to exercise an influence upon the negotiation of treaties by appropriating, or by failing or refusing to appropriate, the funds necessary for the support and expenses of the commissioners appointed by the President for the purpose of conducting the negotiations.<sup>2</sup> If the appropria-

with a foreign government . . . the Executive has competent authority to negotiate . . . with a foreign government—an authority Congress cannot constitutionally abridge or increase.” Richardson, *Mess. and Pap. of the Presidents*, III, 146.

<sup>1</sup> Thus, by a provision contained in the sundry civil bill passed Aug. 7, 1882, the sum of \$20,000 was appropriated to pay the expenses of a commission to negotiate a reciprocity treaty with Mexico, which was accordingly done. House Rept. 2615, 49th Cong., 1st sess., p. 15. In the minority report of the Ways and Means Committee on the treaty as negotiated it was stated that “The right of Congress to enact this legislation is found in the clause of the Constitution which confides to it the regulation of commerce.” Again, the House alone has sometimes requested the President to negotiate a treaty (*Hinds, Precedents*, II, 985, 986, 988). The House also requested the President not to negotiate a treaty (*ibid.*, 988). A call by the House for papers regarding the negotiation of a treaty was complied with by President Jackson, but was not to be considered a precedent (*ibid.*, 1003). Congress, on another occasion, attempted to limit the time within which treaties should be negotiated and ratified (*ibid.*, 1001).

<sup>2</sup> In this connection it may be noted that by an act of March 3, 1871, Congress forbade the treaty-making agencies thereafter to deal with the Indian tribes as if they were independent nations; and the tribes have since been dealt with through domestic Executive and Legislative authority (16 Stat. at L., 566, R. S. sect. 2079). It is significant that this provision was contained in an appropriation act, which suggests that its practical enforceability rests upon the power of Congress to withhold appropriations to enforce Indian treaties. The Supreme Court had held that an Indian nation was a community with which the United States could enter into treaty relations. *Worcester v. Georgia*, 6 Pet., 515.

tion is made, the consent of Congress to the negotiations is thereby given. The negotiations might be undertaken without such consent; but the enactment of an appropriation bill gives the President the moral support of the two houses, without which he might hesitate to proceed.<sup>1</sup>

[For References, see p. 532.]

<sup>1</sup> As indicated, however, in Chapter XVI, a special appropriation for the negotiation of a treaty is not usually necessary, since the President may utilize the regular diplomatic representatives, or may appoint special agents and pay them out of the contingent fund for foreign intercourse. In the case of secret agents, he may pay them on Presidential receipts or certificates, without vouchers specifically accounting for such expenditure. R. S. sect. 291.

## CHAPTER XXIII

### THE TREATY-MAKING POWER: PRACTICAL OPERATION

PRESIDENTIAL attitude toward Congressional participation in treaty-making is always influenced by the exigencies of practical politics, and for this reason, if no other, it has varied greatly from period to period. Legally, the Chief Executive may ignore the Senate until the draft treaty has been negotiated; and it follows, *a fortiori*, that he may ignore the House of Representatives.<sup>1</sup> The latter body, however, has sometimes endeavored to take a hand in pending negotiations. Thus, in a resolution passed in 1848 the House requested President Polk to transmit to it information regarding negotiations then going forward with Mexico. The resolution failed to contain the usual clause conditioning compliance upon compatibility with the public interests, and it was a manifest attempt to withdraw from the full control of the President negotiations that were still in progress; Polk naturally declined to comply with it.<sup>2</sup> As far back as 1796 the House, replying to President Washington's message on the Jay Treaty declining to transmit information regarding the negotiation, disclaimed any part in

<sup>1</sup> Senator Spooner, an able constitutional lawyer, declared in 1906: "From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations exclusively in the President. And he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined." Cong. Record, Jan. 23, 1906, vol. 40, p. 1418. Cf. the remarks of Senator Lodge to the same effect, *ibid.*, 1470.

<sup>2</sup> Richardson, *Mess. and Pap. of the Presidents*, IV, 565-7. Cf. the resolution introduced into the Senate by Senator Knox on June 10, 1919, regarding the separation of the treaty of peace with Germany and the Covenant for the League of Nations. Cong. Record, 66th Cong., 1st sess., p. 935

treaty-making. The resolution then adopted expressly excepted from the request any information whose publication would have a prejudicial effect upon pending negotiations.<sup>1</sup> Even so, the President, in this instance also, declined to comply. None the less, although legally the President may ignore the House, considerations of practical politics may force him to consult that body or to transmit to it information requested, in order to secure necessary appropriations.

The same considerations may also, on occasion, make it prudent for the President to take the Senate into his confidence prior to opening negotiations, by presenting to that body for confirmation, the names of the negotiators, or by submitting their instructions for approval, or in other ways. In 1792 President Washington addressed a communication to the Senate asking whether that body would advise and consent to an extension of the powers of the commissioners delegated to negotiate a treaty with Spain, and to the ratification of a treaty to be negotiated in conformity with such instructions. The Senate, by a resolution passed by a two-thirds vote, answered both inquiries in the affirmative, thus actually promising approval before the treaty was negotiated.<sup>2</sup> However, as we have seen, the President did not always take this course.

In 1846 James Buchanan, then Secretary of State, in writing to our minister to Great Britain with reference to pending negotiations, pointed out that a rejection of the British ultimatum might lead to war, and added that, since the Senate constituted a portion of the war-making power, "the President, in deference to the Senate, and to the true theory of the constitutional responsibilities of the different branches of the Government, will forego his own opinions so far as to submit to that body any proposition which may

<sup>1</sup> *Annals of Congress*, 4th Cong., 1st sess., 759-60.

<sup>2</sup> *Senate Executive Journal*, I, 106, 115.

be made by the British Government.”<sup>1</sup> If this be the true theory of constitutional responsibilities, it would seem that something might also be said in favor of consulting the House of Representatives, as the other branch of the war-making power. As we have seen, President Polk consulted the Senate in 1846 regarding pending treaty negotiations. In a message to that body he declared this practice to be “eminently wise.”

“The Senate,” he continued, “are a branch of the treaty-making power, and by consulting them in advance of his own action upon important measures of foreign policy which may ultimately come before them for their consideration, the President secures harmony of action between that body and himself. The Senate are, moreover, a branch of the war-making power; and it may be eminently proper for the Executive to take the opinion and advice of that body in advance upon any great question which may involve in its decision the issue of peace or war.”<sup>2</sup>

Certainly Presidents have not always, or even usually, adopted such a conciliatory attitude toward the Senate during treaty negotiations.<sup>3</sup> It may, however, be not only a necessity of practical politics, but also a moral duty of the President, so far to coöperate with the other branch of the treaty-making power as to consult with the Senate, or at least to take into his confidence influential members of the foreign relations committee, during the course of important negotiations.<sup>4</sup> If there is thus a moral duty on the part of the President to consult the Senate, it follows that, correlative, there is a moral right on the part of the Senate to be consulted. Some friction and lack of smoothness in the working of the treaty-making function of the Govern-

<sup>1</sup> *Works of Buchanan* (Moore ed.), VI, 379, quoted by Crandall, *op. cit.*, 71 n.

<sup>2</sup> Richardson, *Mess. and Pap. of the Presidents*, IV, 449.

<sup>3</sup> In the course of the debate on the Treaty of Versailles of 1919 certain senators complained that, although the President was in full control of the cables and wireless, he did not consult with them nor ask their advice during the Peace Conference. Cong. Record, November 6, 1919, p. 8485.

<sup>4</sup> President McKinley, as we have seen, went so far as to appoint members of the Senate on the commission to negotiate the treaty of peace with Spain.



ment is, however, almost inevitable, considering that the concurrent action of two independent branches of the Government is necessary, and especially when the President and the majority of the Senate belong to opposite political parties.<sup>1</sup> But friction may be largely reduced by an earnest effort on both sides to act in harmony.

#### TREATIES IN THE SENATE

The Senate can have no official notice as to the text of a treaty, and can secure no copy as a basis of action, except through the President. This arises from the fact that the President is the sole official organ of communication between the American and foreign governments. It follows also that the Senate cannot act officially upon a treaty, either favorably or unfavorably, unless and until the properly signed and authenticated draft has been transmitted by the President. This is true, even though the Senate should, through other channels, come into possession of an official copy of the document in question. During the early part of the first session of the sixty-sixth Congress, reports were circulated to the effect that the treaty of peace with Germany had been made public, and a document which purported to be a complete, correct, and official copy of the proposed treaty was placed in the hands of a member of the foreign relations committee of the Senate by the European correspondent of one of the metropolitan dailies, who had returned with it to this country; and, on June 9, 1919, this copy was spread on the record of Congress. The treaty, however, was still under negotiation at Versailles and was not signed until June 28. Even if this had not been the case, and even if the draft which thus came into the possession of the Senate proved to be an identical copy

<sup>1</sup> Interesting observations upon the relations between the President and the Senate in treaty-making are made by Woodrow Wilson in his *Congressional Government* (Boston, 1885), 232, and in his *Constitutional Government in the United States* (New York, 1908), 139-140.

of that which the President subsequently transmitted, the treaty could not at that time have been before the Senate for official action in advising and consenting to its ratification. Action at this point would have been premature and undoubtedly futile, because the President could still have refused ratification. He doubtless might, however, have considered favorable action upon the unofficial copy as sufficiently indicating the Senate's consent to the ratification of the treaty, or unfavorable action as foreshadowing rejection.

When the President sends the draft of a treaty to the Senate, the question may be raised whether that body is entitled to any more information than is contained in the bare text of the document. One objection that has sometimes been voiced to the participation of the Senate in treaty-making has been that its members are unfamiliar with the course of the negotiations. This objection may be overcome, however, to some extent at least, through the transmission by the President of as full information as may, compatibly with the public interest, be disclosed. In the case of the treaty of peace with Spain, President McKinley sent to the Senate various papers, including the protocols of the conferences at Paris between the American and Spanish commissioners.<sup>1</sup>

Although the President should, wherever feasible, transmit to the Senate, together with the draft of a proposed treaty, such information and explanations as will enable that body to act in an intelligent manner, nevertheless it is within his discretion to determine what information shall, or shall not, be furnished. The President cannot be compelled, except perhaps in impeachment proceedings, to submit to the Senate papers in his possession relating to treaty negotiations. It may not always be compatible with the public interest (or the President may feel it not to be such) to supply the Senate with full information regarding

<sup>1</sup> Sen. doc. 62, pt. 2, 55th Cong., 3rd sess. (1899).

all the circumstances of a difficult negotiation; and, to this extent, the Senate may be compelled to act in partial ignorance.<sup>1</sup>

#### SENATE AMENDMENTS AND RESERVATIONS

When the text of a proposed treaty is transmitted to the Senate it is customary for that body to refer it to its Committee on Foreign Relations. The committee may fail to report the treaty back to the Senate, but ordinarily a report is made.<sup>2</sup> Such report may recommend (1) that the Senate advise and consent to the treaty as drafted; (2) that it refuse its consent entirely; or (3) that it consent on condition that certain amendments, reservations, or understandings be incorporated in the instrument. Since the majority party in the Senate has also a majority vote in the committee, the action of the committee is determined by that party. Although a two-thirds vote of the Senators present is required in order to give consent to ratification, as well as to postpone indefinitely, all other motions and questions upon a treaty are decided by a majority vote.<sup>3</sup> Hence, the majority party, even though it has only a bare majority, may attach to the resolution of ratification such proposed amendments and reservations<sup>4</sup> as it sees fit, and those members of the Senate who belong to the minority party (to which perchance the President may also belong),

<sup>1</sup>Thus, President Wilson declined to submit to the Senate along with the Treaty of Versailles of 1919 the *procès-verbal* or minutes of the Peace Conference. "The reason," said the President, "we constituted that very small conference was so that we could speak with the utmost absence of restraint, and I think it would be a mistake to make use of those discussions outside." *Hearings before the Senate Committee on Foreign Relations on the Treaty of Peace with Germany*, p. 521.

<sup>2</sup>In the case of the German peace treaty, the foreign relations committee deliberated two months before reporting the instrument back to the Senate.

<sup>3</sup>Senate Rule XXXVII.

<sup>4</sup>Amendments are distinguished from reservations in that the former involve textual changes, while the latter do not. A. H. Washburn, "Treaty Amendments and Reservations," *Cornell Law Quarterly*, V, 257 (March, 1920). Cf. Q. Wright, "Amendments and Reservations to the Treaty," *Minnesota Law Review*, III, 17 (December, 1919), and E. S. Corwin, *The Constitution and What It Means Today*, 53.

are then reduced to the necessity either of voting against the treaty or of accepting it with the amendments and reservations added by the majority, notwithstanding that these may be obnoxious to many members of the minority. If the President, through his control of the negotiations, may place the Senate in the dilemma of either accepting his treaty of peace or prolonging against its will the state of war, so, likewise, the majority members in the Senate may place the minority members in a situation where they are forced either to accept the (to them) obnoxious conditions attached by the majority to the resolution of ratification or to reject the treaty entirely.<sup>1</sup>

As already indicated, the negotiation of a treaty, using the term in the broad sense, may be considered as still in progress while the instrument is before the Senate for approval or rejection. This fact has sometimes been overlooked or not understood by foreign governments, who have been inclined to regard as something akin to a breach of faith the failure of the Senate to consent to the ratification of a treaty in the identical form in which it left the hands of the negotiators.<sup>2</sup> Governments are presumed to take reciprocal notice of the provisions of constitutions concerning the location of the treaty-making power.<sup>3</sup> The Senate is legally free to exercise an independent judgment in regard to the terms of a proposed treaty, and, as already indicated, it may consent to ratification without change, may reject absolutely, or may consent to ratification with amendments.<sup>4</sup> Speaking strictly, the Senate cannot amend a treaty. But it can propose amendments and such amendments become parts of the instrument when accepted by the President and by the foreign government concerned. When,

<sup>1</sup> The situation on the Treaty of Versailles is an illustration. See speech of Senator Walsh of Montana, Cong. Record, March 19, 1920, vol. 59, p. 4903.

<sup>2</sup> *Diplomatic Hist. of the Panama Canal*, Sen. doc. 474, 63rd Cong., 2nd Sess., p. 14; *History of Amendments Proposed to the Clayton-Bulwer Treaty*, Sen. doc. 746, 61st Cong., 3rd Sess., p. 3.

<sup>3</sup> Secretary Gresham to the Brazilian minister, Oct. 26, 1894, *Moore's Digest of Internat. Law*, V, 361; *For. Rels. of U. S.*, 1894, p. 79.

<sup>4</sup> *Haver v. Yaker*, 9 Wall., 32.

therefore, the Senate proposes amendments, the President, unless he elects to drop the treaty entirely (as he has sometimes done), must renew negotiations looking to the acceptance of such amendments by the foreign government. Practically, the Senate may thus participate in negotiations, although only, of course, through the voluntary agency of the President. "The Senate," declared Senator Bacon, "actively engages in the work of negotiation when it makes an amendment to a proposed treaty, which amendment is to be submitted by the President to the foreign power for its consideration and approval."<sup>1</sup> When the Senate advises and consents to the ratification of a treaty on condition that certain amendments be incorporated in it, and the consent of the foreign government is secured to the instrument as thus amended, the President may probably then proceed to the ratification of the treaty without resubmission, in the amended form, to the Senate.<sup>2</sup>

After transmission to the Senate, a treaty may be recalled by the President at any time for farther consideration,<sup>3</sup> and it may later be resubmitted to the Senate with changes which the foreign government has accepted or it may be dropped. The President's power of thus controlling a treaty even while it is under consideration by the Senate rests upon his ultimate right to kill it by failing to ratify it or to exchange ratifications, if he deems that course desirable. The Senate has sometimes proposed such amendments to a treaty project that the President, facing the alternative of securing

<sup>1</sup>"The Treaty-Making Power of the President and the Senate," *North American Review*, CLXXXII, 505. An example of this occurred in 1844, when our minister to Mexico was appointed and directed by the President to open negotiations for the purpose of obtaining the consent of the Mexican Government to the modifications introduced by the Senate into the convention signed with that Government on Nov. 20, 1843. Sen. doc. 231, 56th Cong., 2d sess., vol. VIII, p. 346.

<sup>2</sup>Upon advice of Secretary Randolph, the Jay Treaty was not resubmitted to the Senate under these circumstances. Crandall, *op. cit.*, 80-81.

<sup>3</sup>Thus the salmon fisheries treaty with Great Britain, after submission to the Senate, was recalled by the President on account of the protests of certain fishery interests in the State of Washington. See Cong. Record, Jan. 17, 1920, vol. 59, p. 1733.

the consent of the foreign government to the amendments or of letting the treaty drop altogether, has adopted the latter course as the lesser evil. A noteworthy illustration is the general arbitration treaties negotiated during President Roosevelt's administration. It is not necessary at this time to go into the merits of the controversy between the President and the Senate in this case. It is sufficient to point out that the difference of opinion did not directly involve the question of the desirability of international arbitration, but turned on the question whether the special agreements to be drawn up for the purpose of defining each particular matter of international controversy should be submitted to the Senate. Neither the President nor the Senate was willing to yield to the other on this point; hence the treaty was lost.

It is universally admitted that the President may withhold ratification from a treaty to which the Senate has given its advice and consent with amendments, but it has been alleged that, if the Senate advises and consents to a proposed treaty in the exact form in which it was submitted by the President, this act "concludes the transaction" and the President has no choice except to ratify.<sup>1</sup> This, however, is undoubtedly an erroneous view. Circumstances might arise which would make ratification inadvisable even after the Senate has approved a treaty without amendment; and the President has, as a matter of fact, under these circumstances, exercised his discretion to withhold ratification.<sup>2</sup>

The power to propose unacceptable amendments may be used by the Senate for the purpose of killing a treaty without incurring the possible odium of rejecting it outright. On the other hand, the power may be used to perfect a treaty or to bring it more nearly into harmony with the political traditions or the economic interests of this country

<sup>1</sup> Senators Brandegee and Reed, in Congressional Record, March 2, 1920, vol. 59, pp. 4032-33.

<sup>2</sup> See Crandall, *op. cit.*, 97, 98.

and of its various sections, on lines which may not have been fully appreciated by the Executive during the preliminary negotiations.<sup>1</sup> The power to propose amendments and to insert reservations or interpretations into its resolution of ratification has been used by the Senate at all periods of our history, but with increasing frequency in later decades.<sup>2</sup> "Of recent years," says a close observer, "the Senate has shown what amounts almost to a mania to amend treaties; and unless the President accepts the amendment, a treaty that may have been the work of months of careful and intricate negotiations is wrecked. . . . More than once I have heard Mr. Hay say that, in dealing with foreign governments, he felt as if he had one hand tied behind his back and a ball and chain about his leg, as he was always hampered by the Senate."<sup>3</sup> Secretary Hay was, indeed, unduly severe in his strictures upon the attitude of the Senate toward treaties. He declared that he "did not believe another important treaty would ever pass the Senate" and that "there will always be 34 per cent of the Senate on the blackguard side of every question that comes before them."<sup>4</sup> Senate reservations and amendments are

<sup>1</sup> "It was a wise provision of the Constitution," says Professor Philip M. Brown, "which placed the power to negotiate and the power to ratify in different hands. Many a time has the Senate performed a great patriotic service as well as a constitutional one in submitting treaties to a merciless examination, and in some cases to revision. An excellent example of this was the first Hay-Pauncefote treaty, which failed to reserve the right of the United States to fortify the Panama Canal. Its revision by the Senate was plainly imperative" (paper reprinted in *Cong. Record*, January 28, 1920, vol. 59, p. 2269). Cf. *History of Amendments Proposed to the Clayton-Bulwer Treaty*, Sen. doc. 746, 61st Cong., 3rd sess., p. 6; W. R. Thayer, *Life and Letters of John Hay*, II, 230, 273. Professor Brown, of course, falls into error in supposing that the power to negotiate and the power to ratify are placed in different hands.

<sup>2</sup> For collection of Senate reservations see Sen. Doc. 135, 66th Cong., 1st sess.; and see articles by C. P. Anderson in *Am. Jour. of Internat. Law*, XIII, 526-30; F. B. Kellogg, *ibid.*, 767-773; and Q. Wright in *Minnesota Law Review*, IV, 14-39 (Dec., 1919). For the reservations proposed to the German peace treaty, see *Cong. Record*, March 19, 1920, vol. 59, p. 4915.

<sup>3</sup> A. Maurice Low, "The Usurped Powers of the Senate," *Am. Pol. Sci. Rev.*, I, 14, 16 (Nov., 1906).

<sup>4</sup> W. R. Thayer, *Life and Letters of John Hay*, II, 170, 254. Hay likened a treaty entering the Senate to a "bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain—it will never

doubtless sometimes proposed and adopted, not for the purpose of perfecting the substance of the treaty, nor yet as indicating any real hostility to the main object of the instrument, but for the simple purpose of protecting the Senate against the real or fancied encroachments of the Executive. This was alleged to have been the animus, in part at least, behind the amendments proposed and adopted to the general arbitration treaties submitted to the Senate in the administrations of Presidents Roosevelt and Taft.<sup>1</sup>

In order that Senate amendments or reservations may be valid and binding as parts of a treaty, they must be approved by the President and must also receive the consent, express or tacit, of the foreign country.<sup>2</sup> In 1838 the United States made a treaty with the New York Indians.<sup>3</sup> But the Senate adopted a resolution which purported to change the terms. The resolution, however, was not brought to the attention of the Indian tribe, was not approved by the President, and was not published with the treaty in the President's proclamation. The Supreme Court, therefore, held that it never became operative and could not be considered as a part of the treaty.<sup>4</sup> Shortly after the Senate advised and consented to the ratification of the treaty of peace with Spain in 1899, it agreed to a joint resolution to the effect

leave the arena alive." *Ibid.*, 393. He was so incensed at the action of the Senate on the first Hay-Pauncefote Treaty of 1900 that he tendered his resignation to President McKinley, which, however, was not accepted. *Ibid.*, 226.

<sup>1</sup> Similarly, some of the Senate (or Lodge) reservations to the Treaty of Versailles, while doubtless animated by a desire to protect general American interests, appear also to have been based, in part, upon a desire to place the President under Congressional supervision in various dealings with foreign nations which he would have under the treaty, if ratified. See D. J. Hill, "The Covenant or the Constitution," *North American Review*, CCXI, 329-331 (March, 1920).

<sup>2</sup> In the Senate resolution advising and consenting to ratification of the treaty of peace with Germany (provided two-thirds of the senators present should concur), subject to certain reservations, it was provided that "a failure on the part of the allied and associated powers to make objection to said reservations and understandings prior to the deposit of ratification by the United States shall be taken as a full and final acceptance of such reservations and understandings by said powers." Cong. Record, March 19, 1920, vol. 59, p. 4915.

<sup>3</sup> 7 Stat. at L., 550.

<sup>4</sup> *New York Indians v. United States*, 170 U. S., 1.



that it was not thereby intended to admit the inhabitants of the Philippine islands to United States citizenship or permanently to annex the islands. The Supreme Court held, however, that the meaning of the treaty of peace could not be altered or controlled by the Senate resolution.<sup>1</sup> On the other hand, our delegates to the Second Hague Conference endeavored to safeguard the Monroe Doctrine by declaring, before signing the convention for the pacific settlement of international disputes, that "Nothing contained in this convention shall be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions."<sup>2</sup> This reservation may be considered as valid, since it was incorporated both in the Senate's resolution of ratification and in the President's proclamation of the treaty, and received the tacit assent of the other signatory powers.

On the other hand, a reservation or interpretation made by the President alone, without the consent of the Senate and of the other signatory power, would not be binding; and for this reason the President usually declines to accompany a treaty with explanations which have not been authorized by the Senate in its resolution of ratification. When the Senate, however, has consented to the ratification of a treaty with certain reservations, and such reservations have been accepted by the other contracting power, the acceptance may

<sup>1</sup> *Fourteen Diamond Rings v. United States*, 183 U. S., 176. For the text of the Senate resolution, see Cong. Record, Feb. 14, 1899, vol. 32, p. 1846. The resolution was passed by a vote of 26 to 22, or less than two-thirds of a quorum, and was never approved by the House of Representatives or by the President. It is to be regarded as an almost contemporaneous explanation of intention, rather than as a reservation. According to Justice Brown, who concurred in the opinion of the court, it would not have altered the situation had the resolution passed the Senate by a unanimous vote.

<sup>2</sup> Malloy, *Treaties, etc.*, p. 2247.

be acknowledged and effectuated by the President alone without consultation with the Senate.<sup>1</sup> It is doubtful, however, whether the President could accept, on behalf of our Government, reservations attached to a treaty by the other contracting power, without securing the consent of the Senate thereto. On at least one occasion the Senate apparently took the position that an amendment or reservation made by a foreign government must be accepted, not only by the President, but also by the Senate itself, in order to be valid as a part of a treaty.<sup>2</sup>

#### OPEN EXECUTIVE SESSIONS

In the great majority of cases the Senate has considered treaties behind closed doors. But within recent years an agitation has arisen in favor of considering them in open executive session, and this has been done in a few cases, the most conspicuous instance being that of the peace treaty with Germany, including the Covenant of the League of Nations. The experience in this case, however, cannot be said to show this method to be wholly satisfactory.<sup>3</sup> It

<sup>1</sup> Thus, the Senate advised and consented to the ratification of the convention between the United States and Denmark ceding to the United States the Danish West Indies, with the proviso that the attitude of the United States in respect to the property of the Danish national church in the islands should be made the subject of an exchange of notes between the two governments. This exchange was effected by the President alone on January 3, 1917. See 39 U. S. Stat. at L., part 2, pp. 1716-7.

<sup>2</sup> In advising and consenting to the ratification of the General Act for the Suppression of the African Slave Trade, the Senate resolved "that the Senate advise and consent to the acceptance of the partial ratification of the said General Act on the part of the French Republic, and to the stipulations relative thereto, as set forth in the protocol signed at Brussels, January 2, 1892," Malloy, *Treaties*, etc., p. 1991. In the debate on the reservations to the German peace treaty Senator Norris said: "I should think, as a matter of law, in our Government, a very serious legal question would be involved that would really affect the validity of a treaty if the President should act and acquiesce in a reservation coming from some other country without the consent of the Senate." Cong. Record, March 19, 1920, vol. 59, p. 4889.

<sup>3</sup> In the debate on reservations to the German peace treaty Senator Thomas expressed his opinion of open executive sessions on treaties as follows: "If any member of this body still holds the opinion that open executive sessions are wise or even politic, I trust the spectacle which the Senate has today presented to the people of the United States will serve to disillusion him. And if anyone longer imagines that any issue submitted to this body for determina-

seemed to render compromise between the various factions in the Senate more difficult. Some persons might hold that compromise in this case was not desirable, and that in order to safeguard the public interests, the full light of publicity should be thrown on the proceedings of the Senate. There is undoubtedly force in this argument, but, where the treaty-making power is vested in two independent organs of the government, and a two-thirds vote in one of these organs is required, compromise may frequently be necessary, if the treaty-making power is to function at all satisfactorily. The experience with the German peace treaty would seem to indicate further that it would be desirable to amend the constitutional provisions relating to the treaty-making power so as to require the consent merely of an absolute majority of all members of the Senate instead of a two-thirds majority of those present, in order to prevent a minority of that body from blocking action.<sup>1</sup>

tion, however great, will escape the contamination of a sordid and humiliating partisanship, let him read the Congressional Record and be undeceived." Cong. Record, March 18, 1920, vol. 59, p. 4847. Although not without some justification, this judgment is probably too severe.

<sup>1</sup> At the Jackson Day banquet of 1920, William J. Bryan said: "According to the Constitution, a treaty is ratified by a two-thirds vote, but the Democratic party cannot afford to take advantage of the constitutional right of a minority to prevent ratification. A majority of Congress can declare a war. Shall we make it more difficult to conclude a treaty than to enter a war?" Address reprinted in Cong. Record, January 9, 1920, vol. 59, p. 1292. In this connection it is interesting to note that in the convention of 1787 Madison secured the temporary adoption of a provision which would have allowed treaties of peace to be made by the President and a mere majority of the Senate; while James Wilson objected to the two-thirds requirement on the ground that "if two-thirds are necessary to make peace, the minority may perpetuate war, against the sense of the majority." *Documentary History of the Constitution*, III, 700, 704. A proposal that a majority of the total number of members should suffice to give the Senate's assent to treaties was defeated by the bare margin of one vote. *Ibid.*, 705.

As a result of the Senate's inability to consent to the ratification of the Treaty of Versailles, a movement developed to reduce the number of senators required to vote favorably on a treaty from two-thirds to a bare majority. The arguments put forth in favor of this change are that the two-thirds rule has proved unworkable in practice and that a minority of the Senate should no longer be allowed to block action. In order to carry out this purpose, as well as to give the President a clear initiative in framing treaties, a joint resolution to amend the Constitution was introduced by Senator Owen as follows: "The President shall have power, by and with the advice of the Senate, to frame treaties, and, with the consent of the Senate, a majority of the Senators present concurring therein, to conclude the same." Senate joint

## PRESIDENTIAL INFLUENCE OVER SENATORIAL ACTION

To what extent may the President control the Senate with a view to securing favorable action on treaty projects? Legally, the Senate is, of course, free to act as it chooses, without regard to the President's wishes; practically, what the President desires is often a factor of considerable importance in determining its course. If the political party to which the President belongs has a considerable majority in the Senate the interests of party success and solidarity will naturally tend to bring into line in favor of the treaty senators who might otherwise adopt an unfavorable attitude. In senatorial action upon treaties, however, party considerations do not usually have as much weight as in the consideration of questions of purely domestic concern. It usually happens that when the Senate votes on treaties members of both parties are found on each side. Exceptions to this rule are most apt to occur in the case of administration treaties submitted to the Senate shortly before a Presidential election.<sup>1</sup>

Although the Senate has sometimes failed to consent to the ratification of treaties which seemed to have general popular approval, that body is by no means entirely lacking in sensitiveness to public opinion, and it will not ordinarily stand out against a treaty, even when submitted by a President of the opposite political party, if ratification is clearly demanded by an overwhelming public sentiment.<sup>2</sup> A treaty

resolution 176, 66th Congress, 2d sess., Cong. Record, March 22, 1920, vol. 59, p. 5009.

<sup>1</sup> Thus in 1888 the Bayard-Chamberlain Treaty was defeated in the Senate by a strict party vote.

<sup>2</sup> But, as Woodrow Wilson has said, "The President has not the same recourse when blocked by the Senate that he has when opposed by the House [of appealing to public opinion]. . . . The Senate is not so immediately sensitive to opinion and is apt to grow, if anything, more stiff if pressure of that kind is brought to bear upon it." *Constitutional Government in the U. S.*, 139. Secretary Hay declared that "the irreparable mistake of our Constitution puts it into the power of one-third plus one of the Senate to meet with a categorical veto any treaty negotiated by the President, even though it may have the approval of nine-tenths of the nation." Thayer, *Life and Letters of John Hay*, II, 219.

initiated by a President who makes no effort to consult with the Senate during negotiations and fails to take senatorial leaders into his confidence, or one negotiated by a Secretary of State who exhibits that lack of adeptness in the political aspects of treaty-making which arises from want of Congressional experience, will naturally have harder sledding in the Senate than would otherwise have been the case. Nevertheless, even with this handicap, the President may on occasion so shape the course of events as to put considerable pressure on the Senate to consent to the ratification of a treaty, in somewhat the same way (although not to the same extent) that he may bring about conditions which practically compel Congress to declare war. The influence which the President may thus exert over the action of the Senate arises from his power largely to control the conditions of negotiation, and thereby virtually to commit the nation beforehand to the adoption of a treaty.<sup>1</sup>

Attempt by the President to bring pressure of this sort to bear upon the Senate has sometimes been severely criticized, and even denounced as a usurpation of power.<sup>2</sup> But, just as a bill containing obnoxious riders, which the President is practically compelled to sign against his better judgment or allow to become a law without his signature, is

<sup>1</sup>Cf. Woodrow Wilson, *Constitutional Government in the United States*, 77; *ibid.*, *Congressional Government*, 233-4.

<sup>2</sup>In the course of the debate on the Treaty of Versailles in 1919 Senator La Follette said: "They [the Senate] have that power [of amendment], but the conditions then operate to deprive them of that freedom of judgment which the Constitution intended to confer upon them. . . . He [the President] has proceeded in such a manner as to render it impossible for the Senate to advise with him effectively upon the subject and also in such a manner as to compel the Senate to concur in the treaty or else leave the country still in a state of war." Cong. Record, Nov. 6, 1919, vol. 58, pp. 8482, 8489. Speaking of the same situation, Dr. David J. Hill declared: "The superior power of the President lies in the fact that he can create conditions which may embarrass the free judgment of his colleagues in exercising the treaty-making power. . . . The contention that one department of the Government may in any way coerce another is a repudiation of the very purpose of the division of power, and would result in the destruction of that freedom under law which the Constitution aims to establish. . . . Absolutism, which the Constitution was intended to prevent, might thus creep in through the usurpation of power by a single department, or even by a single officer of the Government." *Present Problems in Foreign Policy*, 162-3.

of as full legal validity as if the obnoxious conditions had not existed, so the validity of a treaty, if duly consented to by the Senate, under whatsoever conditions of practical compulsion, is not thereby affected; for full legal freedom of action on the part of the Senate remains. Doubtless the framers of the Constitution had no intention that either form of coercion should be employed. If this be so, one must simply say that constitutional theory has been modified by practice. Moreover, on account of the independent position of the Senate and the long tenure of its members, it is extremely difficult to put such pressure upon that body as practically to rob it of free judgment in treaty matters. Certainly, as the precedents amply show, the President can exert much less pressure upon the Senate in such matters than upon Congress in bringing about a declaration of war. The President "proposes but by no means disposes, even in this chief field of his power."<sup>1</sup>

#### CONCLUSIONS

In conclusion, the question may be raised whether the participation of the Senate in the treaty-making power has been, on the whole, injurious or beneficial in its effect upon the general course of our foreign relations. Participation by the Senate may be objected to on the ground that the action of that body is taken by men who, as a rule, are not wholly familiar with the preliminary negotiations, who are sometimes, perhaps, too easily swayed by considerations of party advantage, and do not rest under any adequate sense of responsibility for their action. There is undoubtedly some force in these charges. The President is primarily responsible for the conduct of our foreign relations, and if such relations become confused and involved through the failure of the Senate to consent to the ratification of a

<sup>1</sup> Woodrow Wilson, *Constitutional Government in the United States*, 139.

treaty, or through its attempt to remodel the instrument under the guise of attaching amendments, with the result of making it unsatisfactory both to the President and to the foreign power, the President may be made to bear blame which does not rightly rest upon his shoulders.

On the other hand, the Senate in its action upon treaties is often more strongly influenced by considerations of domestic than of foreign policy. This tendency was illustrated, to mention no more recent examples, by the rejection of the treaty of 1844 for the annexation of Texas and by the failure to act upon the Danish treaty of 1868 for the acquisition of St. Thomas. In the former case the slavery issue was involved, while in the latter the controlling impetus was hostility to the administration. Senatorial failure to act on the Danish treaty placed us in the untenable position of refusing to purchase the Danish islands, while, under the Monroe Doctrine, we would not allow the mother country to sell them to any other nation. We finally purchased them in 1916 for several times the price at which we might have secured them in 1868, had the Senate then been able to forget domestic issues and to regard the matter wholly from the standpoint of external policy. Sometimes, however, controlling domestic considerations relate to the welfare of the country rather than to party advantage, and instances have occurred in which the attitude of the Senate came to be generally recognized as more far-sighted than that of the Executive. A minority of the Senate should not be allowed to block action; and it should be possible for the Senate to act by vote of a majority of all the senators elected—at all events provided that such majority represents states having more than half of the total population of the country. Aside from this change, however, our experience with the making of treaties does not clearly indicate any need of a fundamental reconstruction of the existing powers and processes.

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## CHAPTER XXIV

### THE AGREEMENT-MAKING POWER

**J**UST as in the relations between individuals many understandings and agreements are entered into which are not embodied in formal contracts, but are nevertheless considered binding, so in the conduct of our international relations it sometimes seems both desirable and necessary to make agreements with foreign nations without the formality of submitting them to the Senate for its advice and consent. In the constitutions of several foreign countries, *e.g.*, France, a distinction is made between different kinds of treaties, and only the more important ones, such as treaties of peace and commerce and those which obligate the finances of the state, are required to be submitted to the legislative branch. There is no express grant of the power of making international agreements without senatorial consent in the Constitution of the United States. None the less, that instrument impliedly recognizes a distinction between a treaty and a mere compact or agreement, for it absolutely forbids the states to make the former, but permits them, with the consent of Congress, to enter into the latter.<sup>1</sup> Moreover, the Constitution confers upon the President diplomatic powers and makes him commander-

<sup>1</sup> Art. I, Sect. 10, cl. 1 and 3. In the case of *Holmes v. Jennison*, 14 Pet., 540, at pp. 571-2, Chief Justice Taney observed that, by the Constitution, "the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation and as the words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word 'treaty.'" They evidently mean something more,

in-chief of the army and navy; and in the exercise of these functions, he may, incidentally, enter into certain kinds of agreements with foreign states. Furthermore, the power of regulating foreign commerce, copyright privileges, and postal affairs is conferred upon Congress; and, incidental to the exercise of these powers, that body may authorize the President to make still other sorts of international agreements.

#### KINDS OF AGREEMENTS

From these considerations it follows that the subject naturally divides itself into two main divisions: (1) simple executive agreements, *i.e.*, those which the President makes on his own authority, and (2) agreements made by the President, or his agents, under the authority of the law-making power, and acting either through treaties or Congressional legislation. The first main class may be subdivided into those agreements which the President makes by virtue of his diplomatic powers and those which he makes by virtue of his position as commander-in-chief of the army and navy. There are cases, however, in which a given agreement may be made under both of these powers, so that the two classes tend to overlap. The second main category of agreements, *i.e.*, those authorized by law, may be subdivided according to subject-matter into such groups as commercial, copyright, and postal agreements. Agreements of either of these two main kinds may ordinarily be made by the President himself. But in some instances they may be made on his behalf by the Secretary of State or the Postmaster-General, or by a military or naval commander.

An executive agreement entered into at an early period of our history under the powers of the President as com-

and were designed to make the prohibition more comprehensive. . . . The word 'agreement' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an 'agreement.'''

commander-in-chief of the navy was the Rush-Bagot agreement of 1817 between the United States and Great Britain, whereby the two powers undertook mutually to limit the extent of their naval armaments on the Great Lakes.<sup>1</sup> This is an example of the President's agreement-making power as commander-in-chief during time of peace. More numerous instances of this power arise, however, during time of war, and include agreements relating to the exchange of prisoners, armistices, and preliminary agreements as a basis for peace. An example of an agreement made under the authority of the President as commander-in-chief of the army was that of July 29, 1882, between the United States and Mexico providing for the reciprocal passage of troops across the border in pursuit of savage Indians.<sup>2</sup> The President has also assumed on several occasions to exercise

<sup>1</sup> Malloy, *Treaties, etc.*, 628. Although the Senate subsequently advised and consented to the ratification of this agreement, and it was ratified and proclaimed by the President, it was at first a mere exchange of notes; and it does not appear that ratifications were ever exchanged. This agreement has at times given rise to some dissatisfaction on the ground that it tended to retard ship-building on the Great Lakes. Doubt was expressed in 1892 whether the convention was still in force. President Harrison referred the question to Secretary Foster, who, after reviewing the agreement's entire history, reported that it was still binding. See report, Sen. Ex. Doc. 9, 52d Cong., 2d sess. However, Mr. Foster observes: "It seems evident . . . that at no time during the negotiations or at its completion did the arrangement in question take the shape of a formal international treaty. As between the United States and Great Britain it never passed beyond the stage of an agreement by exchange of notes. . . . No exchange of ratifications took place." *Ibid.*, 13. See also address by C. H. Butler in *Proceedings of Lake Mohonk Conference on International Arbitration, 1910*, 107-112, where it is related that "so carefully has the United States adhered to this agreement that when the Chicago World's Fair wanted to have a naval vessel of the United States anchored in front of the Exposition grounds as an exhibit, our government refused to allow any vessel to go through the locks for fear it might be regarded as an infraction of the treaty. The result was that a brick and mortar battleship was built on piles in the harbor of Chicago and mounted with imitation guns." As a matter of fact, however, the agreement has not been as strictly observed as Mr. Butler's remarks might be construed to imply. See Bigelow, *Breaches of Anglo-American Treaties*, 32-4. In 1898 the American members of the Joint High Commission were instructed to secure a revision of the Rush-Bagot agreement so as to allow warships to be built on the Great Lakes, provided they were not to be used thereon. House doc. 471, 56th Cong., 1st sess. (1900).

<sup>2</sup> Malloy, *op cit.*, 1144. A memorandum attached to this agreement recited that "as . . . the constitution of the United States empowers the President to allow the passage without the consent of the Senate, this agreement does not require the sanction of the Senate, and will begin to take effect twenty

the power of agreeing with foreign governments to allow the passage of their troops across our territory.<sup>1</sup>

Executive agreements sometimes prove to be permanent arrangements, but in most cases they are intended only to serve until more regular arrangements covering substantially the same matters can be made by treaty. These temporary, or provisional, agreements are sometimes called protocols or *modi vivendi*. Thus, on February 15, 1888, a notable *modus vivendi* was entered into by the United States and Great Britain concerning American fishing rights along the coast of British North America.<sup>2</sup> Again, on August 12, 1898, the American Secretary of State and the French ambassador at Washington, the latter acting on behalf of the Government of Spain, signed a protocol of agreement embodying specifications of a basis of peace between the two governments. This instrument contained such important provisions at those whereby Spain relinquished all claim of sovereignty over Cuba and ceded to the United States the island of Porto Rico; and these provisions were subsequently incorporated in the definitive treaty of peace, whose ratification was advised and consented to by the Senate.<sup>3</sup> In 1901—to cite one more illustration—the United States, together with the other principal powers, signed a protocol with China, embodying terms for the settlement of the troubles growing out of the Boxer uprising, and imposing considerable obligations on the Chinese Government.

#### AGREEMENTS UNDER CONGRESSIONAL AUTHORIZATION

In numerous instances Congress has passed acts authorizing the President to enter into international agreements days after date." *Ibid.*, 1145. See also A. S. Hershey, "Incursions into Mexico and the Doctrine of Hot Pursuit," *Am. Jour. Int. Law*, XIII, 557-69 (July, 1919).

<sup>1</sup> See Moore, *Digest of International Law*, II, 389-400, and *Tucker v. Alexandroff*, 183 U. S., 435, 459.

<sup>2</sup> Malloy, *Treaties, etc.*, 738-9.

<sup>3</sup> *Ibid.*, 1688, 1691.

not requiring submission to the Senate; and under this authority he has made many agreements relating to trade marks, copyrights, reciprocal commercial privileges, the acquisition of territory, and other matters.<sup>1</sup> Since 1871 the Indian tribes have been dealt with, not through treaties, but through executive agreements which have been presented to Congress for approval.<sup>2</sup> From an early period, postal agreements have been made with foreign countries, and under an act of 1872<sup>3</sup> the Postmaster-General is authorized, by and with the advice and consent of the President, to negotiate and conclude postal treaties or conventions. Under this authorization, several such conventions have been entered into. Despite the language of the act, these conventions cannot properly be called treaties. Executive agreements authorized by prior acts of Congress may be considered as agreements made with the advice and consent of Congress, instead of the Senate, the advice and consent in this case being given before, instead of after, the agreement is made, and by a mere majority instead of a two-thirds vote. In making agreements authorized by acts of Congress, the President may be considered as exercising his constitutional power of taking care that the laws are faithfully executed.<sup>4</sup>

The legality of agreements entered into by the Executive under the authority of certain acts of Congress has been upheld by the Supreme Court. Thus the McKinley tariff act of October 1, 1890, authorized the President to exercise powers, under certain conditions, which resulted in the making of reciprocal tariff agreements with other countries, and to suspend, by proclamation, the free introduction into this country of certain articles from countries imposing

<sup>1</sup> For a detailed account of these agreements, see Crandall, *Treaties, Their Making and Enforcement* (2d ed.), Chap. IX.

<sup>2</sup> Crandall, *op. cit.*, 134.

<sup>3</sup> U. S. Revised Statutes, sect. 398. Such postal agreements have been held valid by the Attorney-General in spite of the constitutional provision relating to treaties. 19 Op. U. S. Atty.-Gen., 513.

<sup>4</sup> Constitution, Art. II, Sect. 2

unequal duties upon the importation of the products of the United States. The court upheld the constitutionality of the act, remarking that the measure "is not liable to the objection that it transfers legislative and treaty-making power to the President."<sup>1</sup> With reference to a commercial agreement with France made by the executive under the authority of the Dingley tariff act of 1897, the Supreme Court declared that, while such agreement "was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact was a treaty under the circuit court of appeals act."<sup>2</sup>

In nature and importance of subject-matter, executive agreements cannot always be distinguished from regular treaties.<sup>3</sup> This was illustrated in connection with the controversy which arose between President Roosevelt and the Senate in 1905 regarding the arrangement with Santo Domingo whereby the United States took over the collection

<sup>1</sup> *Field v. Clark*, 143 U. S., 649.

<sup>2</sup> *Altman v. U. S.*, 224 U. S., 583 (1912). On this case see editorial note in *Am. Jour. Internat. Law*, VI, 716-19 (July, 1912), where it is pointed out that if Congress can authorize the President to make reciprocal tariff agreements without submission to the Senate a general treaty of arbitration might authorize the President to make special executive agreements in particular cases. See also C. H. Butler, "The Relations of Congress to General Arbitration," *Proceedings of Lake Mohonk Conference on International Arbitration*, 1912, pp. 202-4.

<sup>3</sup> "It may be proper to observe," says Secretary Foster, "that the resort of an exchange of diplomatic notes has often sufficed, without any further formality of ratification or exchange of ratifications, or even of proclamation, to effect purposes more usually accomplished by the more complex machinery of treaties." Report on the Rush-Bagot Agreement, December, 1892, Sen. Ex. Doc. 9, 52d Cong., 2d sess., p. 13. This is not equivalent to saying that the nature of the subject-matter of treaties and of executive agreements may be entirely identical, but merely that the same or similar purposes may be effected by the two methods.

of the custom duties of that island. The President, being unable to secure the Senate's approval of a treaty effecting this arrangement, nevertheless carried out the plan by means of simple agreement. Not until two years later did the Senate consent to the ratification of a treaty embodying substantially the same terms as the agreement. Similarly, the Nicaraguan convention of 1911 failed to receive Senatorial approval, but, under an executive agreement similar to that of 1905 with Santo Domingo, the objects of the convention were substantially attained.<sup>1</sup> In these cases, as in some others, failure to secure the Senate's approval did not tie the President's hands; certainly it did not prevent him from carrying out the foreign policy upon which he was bent.<sup>2</sup>

#### AGREEMENTS UNDER TREATY AUTHORIZATION

In some instances the President, in the exercise of administrative power, enters into particular agreements without the consent of the Senate, but in accordance with the provisions of general treaties which have previously received the advice and consent of that body. Thus numerous extradition treaties have been approved by the Senate, enumerating the extraditable offenses; but each particular case of the surrender of a fugitive from justice involves a special international agreement entered into by the Executive alone. As Chief Justice Taney pointed out in an early case: "From the nature of the transaction the act of delivery [of the fugitive] necessarily implies a mutual agreement."<sup>3</sup> It has never been considered necessary that such an agreement receive the consent of the Senate. Nevertheless, in other instances of a similar kind the Senate has shown a disinclination to allow the President a free hand in making special agreements. Thus in the case of a pro-

<sup>1</sup> Ogg, *National Progress*, 257.

<sup>2</sup> Cf. Reinsch, *American Legislatures and Legislative Methods*, 102-4.

<sup>3</sup> *Holmes v. Jennison et al.*, 14 Pet., 540.

posed arbitration treaty with Great Britain, presented for approval in 1897, the Senate proposed to amend by requiring that any agreement to submit a difference to arbitration under the treaty should "be communicated by the President of the United States to the Senate with his approval, and be concurred in by two-thirds of the Senators present."<sup>1</sup>

A convention adopted at the Hague Conference of 1899 established a permanent court of arbitration and reserved to the signatory powers the right of concluding general or particular agreements extending obligatory arbitration to cases in which they might deem it to be applicable. In pursuance of this provision, Secretary Hay negotiated several general arbitration treaties providing for submission to the permanent Hague court of certain differences between the contracting parties which were found difficult or impossible to settle by diplomacy. These treaties also provided that in each case, before appealing to the Hague court, the contracting parties should conclude a *compromis*, or special agreement, defining the matter in dispute and the powers of the arbitrators. When these Hay treaties were laid before it, the Senate substituted the word "treaty" for the word "agreement," in order to make certain that it would always be consulted. Dissatisfied with the treaties as thus amended, President Roosevelt declined to carry the project farther. Profiting by this experience, Secretary Root negotiated, in 1908, several general arbitration treaties which reserved to the Senate the right to advise and consent to all special agreements made under such treaties;<sup>2</sup> and the Senate promptly consented to their ratification.

In 1911 a controversy arose between President Taft and the Senate over a new group of general arbitration treaties. Following the Root treaties of 1908, these instruments pro-

<sup>1</sup>Senate Executive Journal, May 5, 1897, reprinted in Senate document 26, 66th Cong., 1st sess., p. 278. This treaty, after being amended, failed to receive the necessary two-thirds vote in the Senate.

<sup>2</sup>See Malloy, *Treaties*, etc., 814.



vided that special agreements made under them should in all cases be submitted to the Senate for its advice and consent. They also provided, however, that, in the event of disagreement as to whether the matter in controversy was subject to arbitration, the question should be submitted for decision to a joint commission of inquiry. To this provision the Senate objected on the ground that it encroached upon that body's constitutional treaty-making power. Consent to ratification was withheld, and the treaties consequently never became operative.

In the cases of the Hay and Taft arbitration treaties, the Senate succeeded in preventing what it deemed to be encroachments upon its constitutional treaty-making power. That body's contention, nevertheless, that a grant of its consent to the ratification of the treaties would have been an unconstitutional delegation of the treaty-making power is hardly borne out by previous and subsequent constitutional practice.<sup>1</sup> The Senate itself has even taken the initiative in inserting in a treaty a provision authorizing the President to enter into a mere executive agreement through exchange of notes.<sup>2</sup> The error of the Senate's view arises from the mistaken supposition that the President, in making special agreements, is acting specifically

<sup>1</sup> Cf. *Fong Yue Ting v. U. S.*, 149 U. S., 698, at p. 714, where the court said: "It is no new thing for the law-making power, acting either through treaties made by the President and the Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit."

<sup>2</sup> Thus the Senate consented to ratification of the treaty of 1916 whereby Denmark ceded the Danish West Indies to the United States, on the understanding that the United States did not assume any responsibility with respect to the property of the Danish national church in the islands and that this matter would be made the subject of an exchange of notes between the two governments. Such exchange of notes took place on January 3, 1917. 39 Stat. at L., pt. 2, pp. 1716-17. Furthermore, Art. 8 of the Haytian treaty of Sept. 16, 1915, provided that Hayti shall not increase its public debt except by previous agreement with the President of the United States. This "phraseology is no doubt due to the desire to remove any question that such an agreement can be made by the President as an executive act as distinct from an agreement by the Government of the United States requiring the advice and consent of the Senate." *Am. Jour. Internat. Law*, X, 863 (Oct., 1916).

in pursuance of his constitutional power to negotiate treaties. If this were true, all such agreements would require the consent of the Senate. In reality, however, the President, in making such agreements, is acting under his general power of conducting the foreign relations of the nation; in the exercise of this proper power it frequently becomes necessary for him to enter into international agreements of various degrees of formality or informality. Moreover, as the Senate minority report on the Taft arbitration treaties of 1911 pointed out, the power to decide whether a particular dispute was or was not justiciable as defined by the treaty was not a delegation of treaty power, but a delegation of judicial power "to find whether the particular case is one that the President and Senate have said shall be arbitrated." It was, therefore, a delegation of the power to determine a question of law or of fact and not of policy.<sup>1</sup>

#### SIMPLE EXECUTIVE AGREEMENTS

Even though the Senate may sometimes check the President in making special agreements, in cases in which such agreements rest upon authorization contained in general treaties, the power of the President in general is thereby curtailed to a comparatively slight extent; for many international agreements entered into by the President or the Secretary of State rest upon the former's general power to adjust disputes which are incidental to the conduct of foreign relations, and may consequently be entered into without either the prior authorization or the subsequent approval of the Senate. Some of these may be mere "gentlemen's agreements," and they are not necessarily reduced to writing;<sup>2</sup> others may be effected by an exchange

<sup>1</sup> Sen. doc. 98, 62d Cong., 1st sess., p. 9.

<sup>2</sup> Cf. the statement of President Wilson at the White House conference with the Senate Committee on Foreign Relations: "It [the cable convention] was not a formally signed protocol, but we had a prolonged and interesting discussion on the subject and nobody has any doubt as to what was agreed upon." *Hearings on the Treaty of Peace with Germany*, 506.

of notes in identical form, and may have important consequences, as, for example, the agreements of 1899 and 1900 concerning the "open door" policy in China, and the Root-Takahira agreement of 1908 and the Lansing-Ishii agreement of 1917, which undertook to define our attitude toward current questions in the Far East. Moreover, despite the defeat of the general arbitration treaties, the President, by virtue of his diplomatic powers, is able to refer to arbitration international disputes which he finds himself unable to settle through ordinary diplomatic negotiations. The President has entered into numerous agreements for the settlement of pecuniary claims, sometimes under the authorization of treaty provision, but frequently by mere executive agreement, without special authorization.<sup>1</sup> As a rule, such executive agreements involve the settlement of pecuniary claims against foreign governments,<sup>2</sup> and no attempt is made to settle, by such means, pecuniary claims against the United States, which might involve the appropriation of funds by Congress. The correct attitude in this matter was illustrated by President Wilson in a memorandum attached to his agreement of May, 1919, with Premier Lloyd-George of Great Britain regarding the disposition of the former German ships. "I deem it my duty," said the President, "to state, in signing this document, that, while I feel confident that the Congress of the United States will make the disposal of the funds mentioned [in the agreement], I have no authority to bind it to that action, but must depend upon its taking the same view of the matter that is taken by the joint signatories of this agreement."<sup>3</sup>

Although a simple executive agreement cannot, at least from the constitutional point of view, bind the Government

<sup>1</sup> Cf. Reinsch, *Am. Legis. and Legis. Methods*, 102.

<sup>2</sup> Thus in 1903 the claims of American citizens against Venezuela were submitted by the President to the Hague Court under an agreement which was not laid before the Senate.

<sup>3</sup> Cong. Record, vol. 59, p. 3429, Feb. 21, 1920.

of the United States to the payment of money, the President may enter into an agreement whose execution is absolutely conditioned on an appropriation by Congress. Thus in 1896 an agreement was arrived at by the Secretary of State and the British ambassador at Washington regarding the expulsion from the United States to Canada of the refugee Canadian Cree Indians,<sup>1</sup> and shortly thereafter Congress passed an appropriation to carry the agreement into effect.<sup>2</sup> Ordinary prudence, however, would suggest that such an agreement should seldom be made except with the distinct understanding that execution is dependent upon Congressional action, or, better, except when Congress has authorized the agreement either directly or indirectly, or has in some way evidenced its willingness to make the necessary appropriation. Thus in 1850, by a simple executive agreement, Horse-shoe Reef in Lake Erie was ceded to the United States by Great Britain on the condition that the United States should erect and maintain a lighthouse thereon.<sup>3</sup> Congress had in the previous year made an appropriation for this purpose, and this appropriation was renewed in the following year and again in 1854, and the lighthouse was finally erected in 1856. Such subsequent appropriation act, or any Congressional enforcement legislation, is equivalent to Congressional sanction of the agreement. By analogy, it may be noted that the Supreme Court has held that under the provision of the Constitution requiring Congressional consent to compacts between states such consent may be given subsequent to the making of the compact.<sup>4</sup> Again, under the Platt amendment of 1901,<sup>5</sup> providing for the sale or lease by Cuba to the United States of lands necessary for coaling or naval stations, the President made an agreement with Cuba, without submission to

<sup>1</sup> Senate Rept. 821, 54 Cong., 1st sess.

<sup>2</sup> U. S. Stat. at L., vol. 29, p. 117.

<sup>3</sup> Malloy, *Treaties*, etc., 663.

<sup>4</sup> *Virginia v. Tennessee*, 148 U. S., 503, pp. 521-22.

<sup>5</sup> 31 Stat. at L., 897.

the Senate, providing for the payment to that republic of an annual sum of money for the use of the land so leased.<sup>1</sup>

By the terms of the Constitution, treaties made under the authority of the United States are a part of the supreme law of the land. This, however, is not ordinarily true of a simple executive agreement which is not made under the authority of a previous treaty or act of Congress.<sup>2</sup> When, however, the President enters into an agreement which is authorized by such prior treaty or Congressional act, the agreement has the force of law equally with the prior treaty or act. Thus the Supreme Court has held that a section of the regulations, or protocol, attached to the international postal treaty of Berne (1874) is a part of the law of the land.<sup>3</sup>

#### CONCLUSION

Frequent resort to executive agreements is undoubtedly open to objection. In contrast with treaties, such agreements may be entered into secretly; and the dictates of practical expediency may sometimes afford a plausible excuse for maintaining secrecy where a more far-sighted policy would avoid it. As a rule, international agreements,

<sup>1</sup>Malloy, *Treaties*, etc., 360.

<sup>2</sup>Secretary Knox expressed the opinion that an exchange of notes setting forth an understanding as to the meaning of a treaty "would not, so far as the internal affairs of this Government are concerned, have the status either of a treaty or of a law, but would be merely an executive interpretation of the treaty and of the Federal Statutes. This would not be binding upon the courts of this country, which might at any time disregard the agreement incorporated in the notes, in which case it would not be possible for the [State] Department to control their decision." *For. Rel. of U. S.*, 1910, p. 732. With this statement, compare the following colloquy which took place during the testimony of ex-Secretary Lansing before the Senate Committee on Foreign Relations at the hearings on the treaty of peace with Germany:

"Senator Brandegee. Has the so-called Lansing-Ishii agreement any binding force on this country?"

"Secretary Lansing. No.

"Senator Brandegee. It is simply a declaration of your policy, or the policy of this Government, as long as the President and the State Department want to continue that policy, I suppose?"

"Secretary Lansing. Exactly, in the same way that the Root-Takahira agreement is." *Hearings*, 219.

<sup>3</sup>*Cotzhausen v. Nazro*, 107 U. S., 215.

as well as treaties, should be entered into only in such a way that the salutary influence of public opinion can be brought to bear upon them; the country should not, as a rule, be bound by the stipulations of executive agreements without its knowledge and without opportunity to protest.<sup>1</sup> Sometimes information regarding proposed agreements is intentionally permitted to leak out during the course of negotiations in order to sound public opinion upon the project. Frequently, however, it is deemed impracticable to make the agreement public until after it has been concluded. Congress, or one of its branches, may pass resolutions asking for information concerning a rumored executive agreement.<sup>2</sup> Such resolutions, although usually requesting the information only "if not incompatible with the public interest," are, indeed, sometimes passed for partisan reasons, with a view to embarrassing the administration. On the other hand, they may be adopted in entire good faith, and may serve a distinctly useful purpose.

As we have seen, it is not always easy to distinguish treaties and executive agreements with reference to their subject-matter, so that these two forms of international agreement may, on occasion, constitute alternative modes of arriving at the same object. A President or Secretary of State seldom wishes to run the gauntlet of the Senate unless necessary; he is likely to have found by experience that consulting the upper house jeopardizes the success of the project, and he may consequently be minded to rely as largely as possible upon executive agreements in lieu of

<sup>1</sup> A resolution was passed by the House of Representatives in 1900 directing the Secretary of State to inform the House "what truth there is in the charge that a secret alliance exists between the Republic of the United States and the Empire of Great Britain." Secretary Hay's answer, transmitted by the President, declared that there was no truth in the charge that such a secret alliance existed, and added that "no form of secret alliance is possible under the Constitution of the United States, inasmuch as treaties require the advice and consent of the Senate, and, finally, that no secret alliance, convention, arrangement or understanding exists between the United States and any other nation." House doc. 458, 56th Cong., 1st sess., p. 2.

<sup>2</sup> For examples of such Congressional requests, see House rept. 2909, 57th Cong., 2nd sess. and Cong Record, vol. 59, p. 3071, Feb. 14, 1920.

treaties. If, however, any large part of our important international understandings comes to be embodied in executive agreements, the provision of the Constitution requiring the submission of treaties to the Senate will, from the standpoint of its general intent, be rendered largely nugatory. Admitting the highest degree of wisdom and patriotism that can be claimed for our Presidents and Secretaries of State, it may still be said that some executive agreements that have been entered into would probably have been improved by the searching examination of their bearings and implications which they would have received if they had been submitted to the Senate.

Despite these objections, however, the usefulness and practical necessity of executive agreements as incidental aids to the conduct of diplomatic business is apparent. Many occasions arise in the course of our foreign relations upon which difficulties of a delicate nature may be more efficiently handled by the President through executive agreements than by the treaty-making body. To require that all international understandings be submitted to the Senate would be burdensome and impracticable. It would not be feasible to conduct our foreign relations with any degree of efficiency under such a rule.

In the absence of express constitutional limitation, the United States, in the conduct of its international relations, may be regarded as endowed with all powers ordinarily exercised by other sovereign and independent members of the family of nations in carrying on foreign intercourse.<sup>1</sup> As was pointed out in 1870 by the territorial court of Washington, speaking of a convention entered into between the United States and Great Britain concerning the boundary line between their respective possessions: "Such conven-

<sup>1</sup> Cf. the view of some writers that the treaty-making power of the United States is not only derived from the Constitution but is possessed "as an attribute of sovereignty." C. H. Butler, *The Treaty-Making Power of the United States*, I, 5. This view, however, is distinct from that above stated and is not accepted by the present writer.

tions are not treaties within the meaning of the Constitution, and, as treaties, supreme law of the land, conclusive on the courts, but they are provisional arrangements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts. The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and inheres where the executive power is vested."<sup>1</sup> In most cases, however, it is not necessary to appeal to the position of the United States as a nation among nations in order to justify the President's practice of entering into international agreements without the consent of the Senate. As a rule, ample ground may be found in his constitutional powers of conducting foreign relations, acting as commander-in-chief of the army and navy, and seeing that the laws are faithfully executed.

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<sup>1</sup> *Watts v. U. S.*, 1 Wash. Terr., 228.



## CHAPTER XXV

### THE ENFORCEMENT OF TREATIES

**F**ROM one point of view, the enforcement of treaties is largely an internal or municipal function and, for the most part, does not bear primarily upon our foreign relations. Nevertheless, the rights of aliens may be involved; and nonenforcement may give rise to increased activity in foreign relations through reclamations against our Government on the part of the foreign nation with which a given treaty was made. Furthermore, the execution of some treaty provisions involves direct contact with foreign governments. Altogether, the subject is so closely connected with the general conduct of our foreign relations that it may properly be given some consideration.

On the basis of the method of enforcement, the provisions of treaties to which the United States is a party fall into two groups. To the first group belong those provisions which are self-executing, in the sense that they do not require auxiliary legislation for their enforcement. They not only embody an international obligation but also constitute a part of the law of the land, and can be carried into execution by the action of the judicial authorities, just as any other law is enforced. Frequently they relate to the rights of aliens, which they undertake presently to establish, and not merely to promise for the future.

The second group of treaty provisions consists of those which contemplate executive enforcement or require auxiliary legislation before they can be effectuated. Until such legislation is enacted, the courts ordinarily decline to participate in enforcement, on the ground that the questions

involved are political rather than justiciable. These provisions embody an international compact whereby international obligations are incurred, but do not immediately constitute parts of the law of the land. The distinction between these two kinds of treaty provisions, with reference to their enforcement, was recognized by the Supreme Court in an early case, as follows: A treaty "is to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."<sup>1</sup>

#### JUDICIAL ENFORCEMENT

As previously indicated, in most cases in which a treaty is self-executing the private rights of aliens are presently established by the instrument's provisions. It occasionally happens that such provisions are strengthened by Congressional legislation, especially when it is thought desirable to provide penalties for violation of treaty rights. But if the treaty provisions are of such a character as to be self-

<sup>1</sup> Foster v. Neilson, 2 Pet., 314 (1829). See also *In re Cooper*, 143 U. S., 472, where the court declared that a treaty "is a law of the land, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined"; and *United States v. De la Maza Arredondo*, 6 Pet., 691, where the court observed that a treaty "is, in its nature, a contract between two nations and the legislature must execute the contract before it can become a rule for the court." An illustration of the latter principle is found in the tenth article of the treaty of 1828 with Prussia, giving Prussian consuls the assistance of local authorities in settling differences between the captain and crew of Prussian vessels. (Malloy, *op. cit.*, 1499). In a case of this sort which arose in 1845 Judge Story, federal district judge for the state of Massachusetts, held that the courts and magistrates of the United States were not empowered to carry into effect this provision of the treaty in the absence of a law of Congress conferring the jurisdiction upon them. James Buchanan, as Secretary of State, consequently recommended that such Congressional legislation be passed. For the correspondence in the case, see House rept. 422, 29th Cong., 1st sess.

operative, ancillary legislation of Congress is really unnecessary, and the court takes the treaty as the rule of law governing it in the decision of the case. Thus in the *Head Money Cases* the Supreme Court said: "But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute."<sup>1</sup> For example, a title to land may be granted to individuals by a treaty, "without any act of Congress or any patent from the executive authority of the United States."<sup>2</sup> As was declared by the Supreme Court in the case just cited, "The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."<sup>3</sup> Speaking generally, when the court takes a treaty as the rule for its guidance and enforces it without auxiliary Congressional legislation, it may be assumed that the treaty relates to matters not embraced among the subjects upon which the Constitution specifically authorizes Congress to exercise legislative power.

<sup>1</sup> *Edye v. Robertson* (*Head Money Cases*), 112 U. S., 580. See also *United States v. Schooner Peggy*, 1 Cranch, 103, where the court said: "Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress."

<sup>2</sup> *Jones v. Meehan*, 175 U. S., 1, at p. 10.

<sup>3</sup> *Ibid.*, at p. 32. For other cases in which the Supreme Court, without any auxiliary Congressional legislation, enforced private rights of aliens derived from treaties, see *Chirac v. Chirac*, 2 Wh., 259, and *Hauenstein v. Lynham*, 100 U. S., 483.

Under the provisions of the Constitution granting to Congress the power to establish inferior federal courts and to regulate the appellate jurisdiction of the Supreme Court<sup>1</sup> it becomes necessary to provide for the handling by the federal courts of cases relating to the construction of treaties. Except in so far as conferred by the Constitution, the federal courts have no jurisdiction in cases involving the construction and enforcement of treaties, at least in criminal cases, until Congress by act grants the requisite authority.<sup>2</sup> The first grant of this kind was made by the Judiciary Act of 1789, which, in substance, is now embodied in the Judicial Code. Under it, the Supreme Court has jurisdiction by way of appeal or writ of error from the decisions of the federal district courts and from those of the highest court of any state, in cases in which the validity or construction of a treaty of the United States is brought in question.<sup>3</sup> The federal district courts are given jurisdiction in civil cases at law or equity arising under treaties made by the United States when the amount in controversy exceeds three thousand dollars, and also in suits brought by an alien for a tort only, in violation of a treaty of the United States, without limitation as to amount.<sup>4</sup> The Supreme Court and the federal district courts are also authorized to issue writs of habeas corpus for the benefit of prisoners held in custody in violation of a treaty of the United States.<sup>5</sup> In addition to the regular federal courts, Congress has sometimes created special tribunals for enforcing treaty provisions in relation to claims. An example is the Spanish Treaty Claims Commission, established for the purpose of hearing cases arising under Article VII of the treaty of peace with Spain.<sup>6</sup>

<sup>1</sup> Art. III, sects. 1 and 2.

<sup>2</sup> Cf. *U. S. v. Hudson*, 7 Cranch, 32.

<sup>3</sup> Judicial Code of the U. S., sects. 237, 238; 36 Stat. at L., 1156, 1157.

<sup>4</sup> Judicial Code, sect. 24, pars. 1 and 17; 36 Stat. at L., 1091, 1093.

<sup>5</sup> Revised Statutes, sects. 751, 753.

<sup>6</sup> 31 Stat. at L., 877. On the working of the provision of this act giving the Supreme Court jurisdiction to consider and decide cases certified to it by

Although there has been some difference of opinion on the matter, it is fairly well settled that Congress could also confer upon the federal courts jurisdiction to punish by indictment violations of treaty rights of aliens. This, however, has never yet been done.<sup>1</sup> Under the Revised Statutes<sup>2</sup> the federal courts already have power to punish as crimes attempts to injure "citizens" in the enjoyment of rights derived from the Constitution or laws of the United States. By changing the word "citizen" to "person," it is thought that the law could be broadened so as to cover aliens.<sup>3</sup> The Supreme Court has declared: "That the United States have power to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities or exemptions

the Commission when the latter body is in doubt, see House rept. 313, 57th Cong., 1st sess., and Senate rept. 4329, 59th Cong., 1st sess. See also *Frevall v. Bache*, 14 Pet., 95.

<sup>1</sup>As to crimes specified in treaties, it is necessary for Congress to pass enforcement legislation before the courts can take cognizance of them. See *The Bello Corrunes*, 6 Wheat., 152.

<sup>2</sup>Sect. 5508.

<sup>3</sup>See "Report of Committee on the Protection by the United States of the Rights of Aliens," *Proceedings of Lake Mohonk Conference on International Arbitration*, 1911, pp. 189-195. Cf. on this subject the recommendations for legislation made by Presidents Harrison, McKinley, Roosevelt, and Taft. Richardson, *Messages and Papers of Presidents*, IX, 183, Supp. 1899-1902, pp. 69-70, 128; *For. Rel. of U. S.*, 1906, pt. 1, p. XLIII; Address of President Taft before the American Bar Assn., 1914, *Reports*, XXXIX, 362. A committee of the American Bar Association appointed to consider the question reported that "there are grave doubts as to the constitutionality" of the proposed legislation. *Reports of the American Bar Assn.*, XV, 416-21 (1892). This report was not adopted by the Association, and at least one member of this committee, Everett P. Wheeler, subsequently changed his mind. See his paper on "The Treaty-Making Power of the Government of the United States" in *Report of the 24th Conference of the International Law Assn.*, 1907, pp. 148, 157. For the diplomatic correspondence relating to the killing of Italians in New Orleans in 1891, see *For. Rel. of the U. S.*, 1891, pp. 658-728, and for a similar case occurring in 1896, see House Doc. 37, and Sen. Doc. 104, both of 55th Cong., 1st sess. Probably the best treatment of the whole matter is found in ex-President Taft's *The United States and Peace*, 40-89, where the distinguished author maintains that there is no doubt of the power of Congress to pass the necessary legislation to punish the violators of the treaty rights of aliens, granted to it by Art. I, sect. 8, clause 18, of the Constitution. On the analogy of the Siebold and Debs cases, he also argues that a statute should be passed by Congress enabling the President to act directly, without reference to state action, in protection of the treaty rights of aliens whenever they are threatened. He adds that such executive power would doubtless be implied if federal court jurisdiction were given, but that it would be better to make it express (p. 86).

guaranteed to them by the treaty [of 1880], we do not doubt.”<sup>1</sup>

Under the constitutional and statutory provisions cited, the courts of the United States are competent, without any special Congressional or executive action, to hear and determine civil cases in which aliens residing in this country allege that their treaty rights are violated. When, for example, certain Italian laborers were called on in Iowa to pay a road tax in violation, it was alleged, of the treaty of 1871 between Italy and the United States, the Italian minister protested, and our Secretary of State replied that “the question was one primarily for the consideration of the judicial tribunals; that, under the Constitution of the United States, treaties were a part of the supreme law and were enforceable by the courts, and that this principle was especially applicable where complaint was made that a state law was in conflict with the treaty; that the authorities of Iowa had taken the view that such a conflict did not exist, and had administered the law accordingly; that in such case provision had been made by law for a review of the matter by the federal tribunals, and that it was competent for any Italian subject who felt aggrieved by the tax in question ‘to apply to the courts of the United States, in which, and not in the executive, our Constitution and laws have lodged the requisite authority for entertaining his suit for relief against the action of which he complains.’ ”<sup>2</sup>

<sup>1</sup> *Baldwin v. Franks*, 120 U. S., 678. A convincing argument in favor of this legislation is contained in the Report of the Senate Committee on Foreign Relations made in 1900 on “Violations of Treaty Rights of Aliens,” Sen. rept. 392, 56th Cong., 1st sess., where it is pointed out that such legislation would not oust the state courts from jurisdiction in such cases, but would supply a concurrent means of trying such cases in the federal courts according to State laws and penalties. “That Congress has the constitutional power so to legislate,” the Committee held, “is not open to question” (p. 4). See also a memorandum on the subject prepared by the Solicitor of the Department of State, House rept. 1056, 60th Cong., 1st sess. (1908), and *Proceedings of Am. Soc. of Internat. Law*, II, 21-67, particularly the Paper of Robert Lansing, pp. 44-60, showing the inconsistent attitude of our Government in asserting the responsibility of foreign governments in cases similar to those in which it disclaims responsibility on its own part.

<sup>2</sup> Moore, *Digest of International Law*, V, 238. A similar response was made in 1890 by Secretary Blaine to the Chinese protest against a residential segre-

## THE COURTS AND POLITICAL QUESTIONS

On the other hand, when political questions are involved, such as treaty provisions relating to boundaries, the courts defer to the action of the political departments of the Government. A question relating to the enforcement or non-enforcement of a treaty considered as an international contract may give rise to reclamations by one contracting party upon the other. "Whether the complaining nation has just cause of complaint is not matter for judicial cognizance."<sup>1</sup> Thus, treaties of alliance and treaties requiring legislative action, such as an appropriation of money or a declaration of war, are not appropriate for judicial enforcement. Furthermore, as has been pointed out, "the protection and enforcement of many rights secured by treaties most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief."<sup>2</sup> The courts would not interfere, by way of either mandamus or injunction, to compel or restrain the payment of money by our Government under a treaty; for this is a matter within the discretion of the political departments. The courts will usually take jurisdiction in cases arising under treaties when private rights are involved, but in arriving at decisions touching political questions they will hold themselves bound by the determinations of the political departments of the Government. The courts have no treaty-making power,<sup>3</sup> and when a question arises as to whether a treaty of the United States was ratified on behalf

gation ordinance of San Francisco (*ibid.*, 239). Again, when a controversy arose between the United States and Japan over the San Francisco school ordinance of 1906 which was alleged to conflict with our treaty of 1894 with that country our Government promptly took appropriate legal proceedings by filing a bill of equity in the federal court in California to enforce the treaty. E. Root, in *Am. Jour. of Internat. Law*, I, 274-7.

<sup>1</sup> *Whitney v. Robertson*, 124 U. S., 190.

<sup>2</sup> *Thompson, J., in Cherokee Nation v. Georgia*, 5 Pet., 1, quoted with approval by Nelson, J., in *Georgia v. Stanton*, 6 Wall., 50.

<sup>3</sup> *The Amiable Isabella*, 6 Wheat., 1, at p. 71.

of the foreign nation by the proper authority, or was made with a sovereign power capable of entering into treaty relations with the United States, the courts will conform their decisions to the determination of these questions made by the political departments of the Government.<sup>1</sup> In the Charlton extradition case, the question arose whether the treaty with Italy was to be construed as having lapsed through its breach by that country. But the court held the instrument to be in full force, because our own Executive still recognized an obligation of the United States under it to surrender its own citizens.<sup>2</sup>

In the case of treaty provisions enforceable by the courts as primary law of the land, without auxiliary legislation, it may happen that there are already laws on the statute-books which are in conflict with the provisions of the later treaty. These may be acts either of Congress or of the state legislatures, which are otherwise valid; and the question arises whether the treaty overrides them. The Supreme Court has declared it to be clear that "the treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations."<sup>3</sup> If within such limits, and not in conflict with the Constitution,<sup>4</sup> a treaty overrides any

<sup>1</sup> Doe v. Braden, 16 How., 635.

<sup>2</sup> Charlton v. Kelly, 229 U. S., 447. Cf. Terlinden v. Ames, 184 U. S., 270, where the court held that the existence of the treaty of June 16, 1852, between the United States and Prussia, notwithstanding the incorporation of Prussia into the German Empire, had been repeatedly recognized by the political department of the Government and could not be questioned by the judicial department, since the matter was a political one.

<sup>3</sup> De Geofroy v. Riggs, 133 U. S., 267.

<sup>4</sup> No case is known in which a treaty of the United States has been declared unconstitutional. John W. Foster, usually an accurate writer, in his *Practice of Diplomacy* (pp. 290-1) implies that this was done in the case of *In re Dillon*, 7 Sawyer, 56, 7 Fed. Cas., 710. But an examination of this case shows that, although the judge was at first of the opinion that Article VI of the amendments to the Constitution set aside a provision of the French consular convention of 1853, the final decision in the case was based on the idea that there was no conflict between the Constitution and the treaty. See Moore, *Digest of Internat. Law*, V, 78-81, 168; Crandall, *Treaty-Making and Enforcement*, 497.

The International Prize Court Convention signed at the Hague in 1907 provided for the carrying of appeals to such court from the national prize



and all earlier enactments, whether of Congress or of state legislatures. This statement is true of the acts of state legislatures, whether they are passed before or after the treaty is made; for Article VI of the Constitution, already cited, requires judges in every state to be bound by all treaties made under the authority of the United States, "anything in the constitution or laws of any state to the contrary notwithstanding."<sup>1</sup> This injunction upon state judges and the rule that treaties are the supreme law of the land are enforced through the appellate jurisdiction of the Supreme Court over the decisions of state courts interpreting treaties.<sup>2</sup>

In the case of prior acts of Congress conflicting with treaties, the Constitution is not so explicit. But it apparently puts them on an equal footing.<sup>3</sup> Although the subjects upon which Congress may exercise its powers are, to some extent at least, enumerated in the Constitution, while those upon which the treaty-making power may act are unenumerated, it is nevertheless well established that the powers of Congress and those of the treaty-making body may overlap and operate upon the same subjects and may

courts of the signatory parties. Doubt arose, however, whether such an agreement could constitutionally be entered into by the treaty-making power, in view of the provision of our Constitution vesting the judicial power of the United States in the Supreme Court and inferior courts established by Congress. This difficulty was resolved through the device of attaching to the Convention an additional protocol providing that, when the national prize courts have jurisdiction, recourse to the international court can only be exercised against the United States in the form of a trial *de novo*, consisting of an action in damages for the injury caused by the capture; and the Senate ratified the convention on this understanding. Charles, *Treaties, etc.*, 250, 262-3. In order to formulate the law to be administered in the international prize court, a conference was held at London which, in 1909, issued a Declaration containing a codification of international maritime law. The ratification of this Convention was advised by the Senate of the United States, but Great Britain failed to ratify on account of the adverse attitude of Parliament. *Ibid.*, 266-82. See also President Taft's Annual Message, 1910, *For. Rel. of U. S.*, 1910, p. VIII.

<sup>1</sup> For fuller discussion of this much-debated topic, see Butler, *The Treaty-Making Power of the United States* (New York, 1902); Corwin, *National Supremacy* (New York, 1913); Willoughby, *Constitutional Law of the U. S.*, Chap. XXXV.

<sup>2</sup> Cf. *Dodge v. Woolsey*, 18 How., 355.

<sup>3</sup> *Whitney v. Robertson*, 124 U. S., 190.

be exerted for the accomplishment of the same ends. If this were not true, the treaty-making power would be so limited as very greatly to impair its effectiveness. That it is subject to some limitations, however, there can be no doubt. It cannot, for example, alter the constitutional distribution of powers, *e. g.*, transfer the power to declare war to the President. Any such attempt would be a colorable, but not a real, exercise of the treaty-making function.

There is abundant judicial opinion to the effect that a treaty overrides a prior act of Congress in so far as it conflicts with it, provided that the treaty is self-executing.<sup>1</sup> Thus a treaty of peace operates to repeal the act or joint resolution of Congress declaring war.<sup>2</sup> As Butler points out, however, "it more often happens that the statute abrogates, and supersedes, the treaty, than that the treaty abrogates, and supersedes, the statute; not because a statute is a higher order of law than a treaty, but because the statute goes into effect without further Congressional action, while the treaty may, and, in many instances, does, require such assistance."<sup>3</sup>

#### EXECUTIVE ENFORCEMENT

In some cases it happens that the duty of enforcing treaty provisions rests primarily upon the Executive rather than upon the courts. As already indicated, treaties may be

<sup>1</sup> See *Taylor v. Morton*, 2 Curtis C. C., 454; *U. S. v. Lee Yen Tai*, 185 U. S., 213; the *Cherokee Tobacco*, 11 Wall., 616, cited in Willoughby, *Constitution*, 486-7, and cases cited in Crandall, *Treaty-Making and Enforcement*, 161, note 12. As to whether treaties modifying revenue laws are self-executing, see p. 474, below.

<sup>2</sup> For another illustration see Moore, *Digest of Internat. Law*, V, 370, citing 23 Op. of U. S. Atty.-Gen., 545, where it is said: "The provisions of the convention with China proclaimed December 8, 1894, were self-executing, so as to modify or repeal a prior statute (of Congress) with which they were in conflict."

<sup>3</sup> *Treaty-Making Power of the U. S.*, II, 85-6. If a treaty overrides a prior inconsistent act of Congress, it follows, *a fortiori*, that the treaty power may constitutionally operate upon the subjects in regard to which Congress is given by the Constitution the power of legislating, but in respect to which the power has not been exercised, provided such matters are appropriate subjects of international negotiation.

considered not only as declaring the law of the land but as imposing international responsibilities and duties upon our Government. When a question arises as to the performance of such duties, it devolves primarily upon the Executive to see that the treaty provisions are enforced, provided that such provisions are operative without auxiliary legislation, and provided, farther, that neither Congress nor the treaty has conferred upon the courts jurisdiction over the question. To this end the President may issue orders and instructions to the appropriate executive subordinátes, or by virtue of his position as commander-in-chief of the army and navy he may use the armed forces. Thus has been upheld, under the Hague Convention of 1907 concerning the internment by a neutral power of belligerent troops found in its territory,<sup>1</sup> the action of the President in ordering the arrest and internment of Mexican troops found violating the territory of the United States.<sup>2</sup> Again, in the case of the Rush-Bagot agreement of 1817 limiting naval armament on the Great Lakes, "the executive orders of the Secretary of the Navy sufficed for full compliance with its terms for a year after its adoption."<sup>3</sup> Similarly, by executive order, military forces of the United States were several times landed in New Granada (Colombia) in order to carry out the provision of the treaty of 1846 with that country whereby we undertook to guarantee the "perfect neutrality" of the Isthmus of Panama.<sup>4</sup> It is obvious that with such matters the courts have nothing to do.

Again, prior to the enactment of Congressional extradition statutes, cases sometimes arose in which the Presi-

<sup>1</sup> Malloy, *op. cit.*, 2298.

<sup>2</sup> *Ex parte Toscano*, 208 Fed. 938.

<sup>3</sup> J. W. Foster, Secretary of State, in Report on Rush-Bagot Agreement, December, 1892, Sen. Ex. Doc. 9, 52d Cong., 2d sess., pp. 11, 14. There was at that time on the statute books, however, an act of Congress placing within the discretion of the President the extent of the naval force to be maintained upon the Great Lakes. *Ibid.*, p. 15; 3 Stat. at L., 217.

<sup>4</sup> Malloy, *Treaties*, etc., 312; "Use by the U. S. of a Military Force in the Internal Affairs of Colombia," Senate doc. 143, 58th Cong., 2d sess.

dent alone carried out the provisions of extradition treaties. Justice Gray said in one of the Chinese Exclusion cases: "The surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or statute for examination of the case by a judge or magistrate. Such was the case of Jonathan Robbins, under article 27 of the treaty with Great Britain of 1794, in which the President's power in this regard was demonstrated in the masterly and conclusive arguments of John Marshall in the House of Representatives."<sup>1</sup> Furthermore, it has been held that the provision of the Hague Convention of 1907 concerning the rights and duties of neutrals in regard to the internment of belligerent troops by a neutral power "does not require legislation to render it effective, and is therefore a part of the law of the land which the President has full power to execute."<sup>2</sup>

As indicated in the next preceding chapter, the President, too, has sometimes carried out general treaty provisions by entering into special executive agreements for the settlement of pecuniary claims against foreign governments. An instance in which the President carried into effect the Hague Convention for the pacific settlement of international disputes occurred in 1903, when he entered into a special agreement for the submission to the Hague court of claims of American citizens against Venezuela. It is also within the power of the President indirectly to execute treaties by carrying out, either finally or subject to judicial review, the laws enacted by Congress for their enforce-

<sup>1</sup> *Fong Yue Ting v. United States*, 149 U. S., 698, at p. 714. See *Fed. Cas.* 16175 and case of *British Prisoners*, 1 *Woodbury and Minot*, 66; and cf. *Butler, Treaty-Making Power*, sect. 434. For Marshall's argument, see *Annals of Congress*, vol. X, cols. 596-618 (March 7, 1800). *Per contra*, cf. *In re Kaine*, 14 *How.*, 103, quoted by *Crandall, Treaty-Making Power*, 230 note.

<sup>2</sup> *Crandall, Treaty-Making*, 245, citing *Ex parte Toscano et al.* (1913), 208 *Fed.*, 938.

ment,<sup>1</sup> or to direct his attorney-general to bring appropriate proceedings in the federal courts for this purpose, *e. g.*, a bill in equity to secure an injunctive order to protect aliens in their treaty rights.<sup>2</sup>

## CONGRESSIONAL ENFORCEMENT

This brings us to a consideration of the enforcement of treaties through Congressional legislation. After enumerating various specific powers of Congress, the Constitution goes on to confer upon that body power to pass all necessary and proper laws for carrying into execution powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.<sup>3</sup> Under this provision Congress is fully empowered to enact appropriate legislation to carry out treaty stipulations<sup>4</sup>—an authority which it frequently exercises, since most treaties of importance require auxiliary legislation to carry them into effect. Thus Congress may enact legislation empowering the President to extradite to foreign countries fugitives accused of crime, in accordance with treaty provisions; or it may by

<sup>1</sup> Cf. the statement of Justice Gray in the case of *Fong Yue Ting*, 149 U. S., 698, at p. 714, cited above, p. 439, note 1. It has also been argued that, on the analogy of the *Debs* and *Neagle* cases (135 U. S., 1; 158 U. S., 564), the President and federal courts may take appropriate measures, such as the use of armed forces or of injunctions, to enforce a treaty not only by punishing violators but by preventing its violation. See Corwin, *National Supremacy*, 293; *ibid.*, *President's Control of Foreign Relations*, 105-8.

Mr. C. H. Burr, in his *Treaty-Making Power of the U. S.*, says (p. 392): "It is thus conclusively established that when the Constitution says that the President shall execute the laws, treaties, since they have the force of laws, come within this constitutional provision." He bases this conclusion upon the assumption that, in the Philadelphia convention, the phrase "enforce treaties" was stricken from among the powers of the President as being superfluous since treaties were to be laws. In reality, however, the phrase was stricken from among the powers of Congress, not of the President. *Documentary History of the Constitution*, III, 601.

<sup>2</sup> See W. D. Lewis, "Treaty Powers: Protection of Treaty Rights by the Federal Government," *Annals of the Am. Acad. of Polit. and Soc. Sci.*, XXXIV, 325-6, where it is pointed out that, unless otherwise expressly directed by Congress, the President may use the secret service placed at his disposal to discover plots which, if carried out, would violate rights guaranteed by treaty.

<sup>3</sup> Art. I, sect. 8, cl. 18.

<sup>4</sup> *Neely v. Henkel*, 180 U. S., 109, at p. 121; *Missouri v. Holland*, 252 U. S., 416; 40 Sup. Ct., 382 (1920).

law provide administrative agencies which the President can utilize in enforcing treaty stipulations.<sup>1</sup> Again, as already indicated, Congress is an important agency in providing for the enforcement of treaties, through its power of regulating the jurisdiction of the courts and of passing judicial procedural laws.

It is now established that the power of Congress to enact legislation for the enforcement of treaties is broader than the ordinary legislative power conferred by the Constitution. The power of making treaties would be an empty one in many cases unless Congress had the power of enforcing them, even though in the absence of such treaties Congress would have no such power. The power of legislating for the protection of migratory birds, prior to the making of a treaty on the subject, was entirely in the hands of the state legislatures, and Congressional legislation attempting to provide federal protection was unconstitutional.<sup>2</sup> But after a treaty was concluded with Great Britain on this subject in 1916, Congress passed a law (1918) to enforce its provisions, and the law was held constitutional by the federal district court which had, prior to the making of the treaty, declared such legislation unconstitutional.<sup>3</sup> Furthermore, both the treaty and the act of Congress were subsequently declared constitutional by the Supreme Court.<sup>4</sup> The President has also issued proclamations containing regulations adopted by the Secretary of Agriculture for the enforcement of this treaty act.<sup>5</sup>

As Attorney-General Cushing declared in 1854, "A treaty, though complete in itself and the unquestioned law

<sup>1</sup> For example, the act of Congress of June 6, 1900, providing for the extradition of criminals from the United States to any foreign territory under the control of the United States was appropriate legislation by Congress in execution of the stipulations of the treaty of peace with Spain. *Neely v. Henkel*, cited *supra*.

<sup>2</sup> *U. S. v. McCullagh*, 221 Fed., 288; *U. S. v. Shauver*, 214 Fed., 154.

<sup>3</sup> 39 Stat. at L., 1702; 40 Stat. at L., 755; *U. S. v. Thompson*, 258 Fed. 257; *U. S. v. Samples*, 258 Fed., 479; *U. S. v. Selkirk*, 258 Fed., 775.

<sup>4</sup> *Missouri v. Holland*, 252 U.S., 416; 40 Sup. Ct., 382 (1920).

<sup>5</sup> See, e. g., proclamation No. 1531 of President Wilson, issued July 28, 1919

of the land, may be inexecutable without the aid of an act of Congress. But it is the constitutional duty of Congress to pass the requisite laws. But the need of further legislation, however, does not affect the question of the legal force of the treaty *per se*.”<sup>1</sup> In other words, it is necessary to make a distinction between the international and the constitutional or municipal aspects of treaties, between the question of the international validity of a treaty and that of its execution municipally through the action of the law-making body. “The treaty-making power, if exercised with reference to a matter which is properly the subject of negotiation with a foreign country, can bind our Government fully in an international sense, though the action of other departments of the Government may still be necessary to execute the treaty.”<sup>2</sup> On numerous occasions in our history the treaty-making power has undertaken to bind the United States internationally to take or not to take certain action requiring for its execution or observance the consent or coöperation of other branches of the Government. Most of our important treaties, from Jay’s treaty of 1794 to the present time, have required for their enforcement the appropriation of money by act of Congress. Again, the treaty power may undertake to bind the United States internationally to go to war or to take warlike action under certain circumstances.<sup>3</sup>

<sup>1</sup> 6 Op. U. S. Att.-Gen., 291, quoted in Moore, *Digest of Internat. Law*, V, 370. For qualification of that part of the Attorney-General’s statement in which he speaks of the “Constitutional duty” of Congress to pass enforcement legislation, see p. 463, below.

<sup>2</sup> Mathews, “The League of Nations and the Constitution,” *Michigan Law Rev.*, XVIII, 386 (March, 1920).

<sup>3</sup> Thus by the Webster-Ashburton Treaty of 1842 we agreed with Great Britain to maintain a naval force on the coast of Africa for the suppression of the slave trade. Malloy, *Treaties*, etc., 655. In our treaty of 1846 with New Granada (Colombia), we guaranteed the “perfect neutrality” of the Isthmus of Panama (*ibid.*, 312) and in the Clayton-Bulwer Treaty of 1850 we entered into a similar covenant with Great Britain respecting the isthmian canal (*ibid.*, 661). Through our treaty of 1904 with Panama we undertook to guarantee and maintain the independence of that republic (*ibid.*, 1349), and at about the same time we extended, by implication, the same guarantee to Cuba (*ibid.*, 364). “These treaty provisions do not go as far as to require a declaration of war, but they almost necessarily imply intervention or warlike measures or

On the other hand, we have from time to time entered into treaties which attempt to place a limit internationally upon the exercise by Congress of powers granted to it by the Constitution. Thus under the so-termed Bryan peace treaties the United States agreed with a number of powers not to go to war with the other contracting party pending investigation of the matter in controversy by an international commission.<sup>1</sup> Furthermore, by the Rush-Bagot agreement between the United States and Great Britain in 1817 the two powers undertook mutually to limit the extent of their naval armaments on the Great Lakes, thereby placing a limit, internationally, upon the power of Congress to provide for the construction of warships upon a designated portion of our coast-line.<sup>2</sup>

When by treaty we bind ourselves to take some action which, under the Constitution, can be taken only by Congress, objection may be raised that Congress is deprived of full discretion and freedom of action, and its decisions become purely perfunctory. It is true that Congress may be placed under a moral obligation to take or not to take certain action by way of fulfilment of treaty stipulations, and, as a matter of practical politics, the obligation might be so strong that Congress would have no alternative but to perform it, just as it is morally obliged to appropriate money to pay the salaries of federal judges. Speaking legally, however, there would be no method of compelling Congress to take or not to take the action necessary to fulfil the obligation incurred under the treaty. Since the

our part in case the independence or neutrality guaranteed is threatened or in imminent danger." Mathews, "The League of Nations and the Constitution," *Mich. Law Rev.*, XVIII, 385. A somewhat similar treaty project negotiated with Nicaragua in 1884 was pending in the Senate when Cleveland became President. He withdrew it, because, as he stated in his annual message of December, 1885, it was "coupled with absolute and unlimited engagements to defend the territorial integrity of the States where such interests lie." He held that this clause was an "entangling alliance," inconsistent with the declared public policy of the United States. Senate rept. 1944, 51st Cong., 2d sess., p. 17.

<sup>1</sup> See, e. g., 38 Stat. at L., 1853.

<sup>2</sup> Malloy, *op. cit.*, 629.



Constitution provides that treaties duly made under the authority of the United States are the supreme law of the land, it might at first sight be thought that Congress, which, of course, is bound by the Constitution, would be legally required to pass enforcement legislation. But, as already pointed out, treaties are not supreme law of the land unless self-executing, and the Constitution places treaties and acts of Congress upon an apparently equal footing. If, as the courts have often held, Congress can constitutionally annul a treaty by subsequent conflicting legislation without the consent of the other contracting party, it can hardly be maintained that Congress is constitutionally bound to take affirmative action in passing legislation to enforce a treaty. If it were the constitutional duty of Congress to pass enforcement legislation, then, *a fortiori*, it would be the constitutional duty of Congress not to pass conflicting legislation.<sup>1</sup> To hold that Congress is so bound is to confuse the validity of a treaty with its execution and to lose sight of the distinction between the international and the municipal aspects of treaties.<sup>2</sup> Without the consent of the foreign power, Congress, of course, could not abrogate the international obligation incurred. But there would be no constitutional or legal impediment to its annulment of the treaty, as far as our municipal law is concerned. Speaking

<sup>1</sup> H. St. G. Tucker denies that Congress is even morally bound to declare war when a treaty provision requires the United States to do so. "If," he says, "the power given to Congress to declare war means anything, it means that the power must be exercised by the free, independent, and untrammelled judgment of the representatives of the people, or it means nothing. To be morally bound is as effective as is being legally bound. . . . There is nothing in our history to give assurance that Congress would recognize the authority of the treaty power to bind Congress to declare war in a cause that it did not approve. The decision as to the policy, as to the existence of the duty, and as to the power to create the duty, would rest with Congress." *Central Law Journal*, LXXXIX, 80-81 (1919). See also Sargent, "The Congress and Treaties," *ibid.*, 370-80.

<sup>2</sup> In House rept. 37, 40th Cong., 2d sess., p. 5, it is said that if a treaty "be not inconsistent with the spirit and purpose of the Government, Congress is bound to give it effect, by necessary legislation, as a contract between the Government and a foreign nation." But it is implied that this is an international, rather than a constitutional, obligation, and also that Congress is to be the judge as to whether the treaty contains the inconsistency indicated.

of this distinction, ex-President Taft declared that "the suggestion that, in order to carry out such an obligation [to declare war] on the part of the United States, it would be necessary to amend the Constitution, grows out of a confusion of ideas and a failure to analyze the differences between the creation of an obligation of the United States to do a thing and the due, orderly, and constitutional course to be taken by it in doing that which it has agreed to do."<sup>1</sup>

#### THE FUNCTION OF THE HOUSE OF REPRESENTATIVES

The House of Representatives, by virtue of its part in law-making, is an important branch of the treaty-enforcing power. This does not constitute it a part of the treaty-making power. But since there is no legal means of compelling the House to pass legislation necessary to enforce treaty stipulations, it has come to be true as a practical proposition that treaty provisions which are inexecutable without auxiliary legislation must, in many cases, receive the approval of the House of Representatives before they can be carried into effect. The function of the House in the enforcement of treaties first came under serious discussion in connection with the Jay Treaty of 1794. Certain provisions of this treaty required for their enforcement the appropriation of sundry sums of money. The House passed a resolution calling upon President Washington for Jay's instructions, together with other papers and documents drawn up in connection with the negotiation.<sup>2</sup> The granting of this request would have had the effect of making the House a participant, at least retrospectively, in the treaty-making process, as well as of enabling it to exercise a more intelligent discretion in deciding upon the expediency of enforcement legislation. Washington emphatically declined to comply with the request, on the ground that

<sup>1</sup> *Enforced Peace*, 67.

<sup>2</sup> *Annals of Congress*, 4th Cong., 1st sess., 759-60; Hinds, *Precedents*, II, 982-984.

the power of making treaties is exclusively vested in the President and Senate, that "the assent of the House of Representatives is not necessary to the validity of a treaty," and that treaties, when duly made by the President and the Senate, become "obligatory" and "the law of the land."<sup>1</sup>

Washington's general position, as stated, was correct, and to a certain extent the House itself concurred in it when, in reply to his message, it adopted a resolution disclaiming any agency in the making of treaties,<sup>2</sup> and when, subsequently, it passed the necessary appropriations. The principle is, however, subject to the following interpretations and modifications. The assent of the House is not necessary to the validity of a treaty, but it may be quite essential to its execution. A treaty is *ipso facto* the law of the land if self-executing. But if auxiliary legislation is required for its execution, it is not law of the land in such a sense that the courts will enforce it before such legislation is enacted. A treaty duly made is obligatory, in an international sense, upon our Government. But there is no legal means whereby Congress can be compelled to perform the obligation. The precedent established in the contest between Washington and the House of Representatives indicates only, therefore, (1) that the House has no share in treaty-making, even retroactively, and (2) that, consequently, the President not only does not have to consult the House prior to or during the negotiation of a treaty (even though the treaty calls for an appropriation), but does not have to transmit to that body documents relating to the negotiation after the treaty shall have been approved by the Senate.

There was, however, an important difference of opinion between the President and the House which was not brought to a settlement. Washington held that when the faith of

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, I, 194-6.

<sup>2</sup> Annals of Congress, 4th Cong., 1st sess., 771, 782.

the nation is pledged the House is bound to pass the necessary appropriations as a mere ministerial act, without the exercise of discretion or any consideration as to the expediency or inexpediency of the treaty provisions; whereas the House, in its resolution, asserted "the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect."<sup>1</sup> This, at all events, is clear, that although the House is in control of its own proceedings to the extent that it may deliberate upon such a question of expediency if it so desires, its deliberations on the matter will not always be carried on in the light of full information, because it cannot compel the President to surrender papers and documents beyond the bare text of the treaty.<sup>2</sup> The result of this mixed situation has been that, while the House still holds to the existence of its discretionary power in the enforcement of treaties, as a matter of fact it has seldom, if ever, refused to take the necessary action to provide the means of enforcement.<sup>3</sup>

<sup>1</sup> Annals of Cong., *loc cit.* See also Cong. Globe, 42d Cong., 1st sess., 835, April 20, 1871.

<sup>2</sup> H. St. G. Tucker, in Chapter VIII of his *Limitations on the Treaty-Making Power*, undertakes to refute the contention of other eminent authorities on the treaty-making power that the contest between President Washington and the House of Representatives resulted in a victory for the President and that all of the Presidents since Washington have followed the position which he took in that contest. In reality there is not so much difference of opinion between Mr. Tucker and the other authorities as might at first sight appear. As we have seen, Washington really took two positions which are closely connected, yet distinguishable; first, that the House had no share in treaty-making and was not entitled to the papers, and second, that the House was bound to pass the appropriation. It would appear that Mr. Tucker is speaking of the second position, while the other authorities are speaking of the first. Washington did not maintain that a treaty could appropriate money of its own force, nor did he deny that the action of the House was necessary for this purpose, as Mr. Tucker seems to imply.

<sup>3</sup> A commercial reciprocity convention with Mexico in 1883, however, provided that it should not go into effect until supplementary legislation had been passed by Congress, but also that such legislation should be passed within a year. Congress failed to act, although the time was twice extended, and the convention finally lapsed. Malloy, *Treaties*, etc., 1151; Moore, *Digest of Internat. Law*, V, 222. For the reasons why Congress did not act, see reports of majority and minority of House Committee on Ways and Means on the Mexican Treaty of January 20, 1883, House Report No. 2615, 49th Cong., 1st sess. See also House rept. 1848, 48th Cong., 1st sess. (1884). Although not strictly in point, it may also be noted in this connection that Congress has

On account of the special function of the House of Representatives in fiscal legislation, the enforcement of treaties through the enactment of measures raising or appropriating public funds stands, at least theoretically, upon a somewhat different footing from other legislative enforcement. The Constitution provides that no money shall be drawn from the treasury except in consequence of appropriations made by law; and, although treaties are declared by that instrument to be law, treaty provisions requiring appropriations are not self-executing, but need an act of Congress to put them into effect.<sup>1</sup> But the Constitution also requires that all bills for raising revenue shall originate in the House of Representatives, and, by custom, this special privilege of the House has been broadened to include bills appropriating money. Although the Senate may, of course, amend money bills, the fact that such measures must originate in the lower house forms a plausible basis for the contention of that body that it has special power in connection with money bills enacted to enforce treaties.<sup>2</sup>

thus far failed to confer upon the federal courts jurisdiction in criminal cases in which the treaty rights of aliens are alleged to be injured by mob violence. See above, p. 451.

<sup>1</sup>Turner v. Am. Baptist Missionary Union, 5 McLean, 347; Frelinghuysen v. Key, 110 U. S., 64; L'Abra Silver Mining Co. v. U. S., 175 U. S., 423.

<sup>2</sup>It is true that the Constitution merely says that all "bills" for this purpose shall originate in the lower house. Admittedly, treaties are not bills; so that this provision is not literally applicable to the question in hand. Nevertheless, in practice, the spirit of the provision has been followed rather than the letter. See Willoughby, *Constitutional Law*, I, 488. The position of the House was stated in a resolution which passed that body in 1880 by a vote of 175 to 62 as follows: "Resolved, That it is the sense of this House that the negotiation by the Executive Department of the Government of a commercial treaty whereby the rates of duty to be imposed on foreign commodities entering the United States for consumption should be fixed would, in view of the provision of section 7 of article I of the Constitution of the U. S. be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives." Hinds, *Precedents*, II, 989. In 1884 the House Committee on Ways and Means reported that, "it is true that the question has been raised whether it would not be competent for the President and Senate alone to enter into treaties which would change the laws for the collection of revenue, but the practice has been uniform, and the House has always insisted that where the rates of duty are changed by treaty, the approval of the Congress is necessary for its execution." House rept. 1848, 48th Cong., 1st sess., p. 1. In support of this position, cf. the able report of J. R. Tucker, chairman of the House Judiciary Committee, 49th

One of the most notable occasions on which this contention of the House has been asserted since the debate on the Jay Treaty was the voting of the appropriation to carry out the treaty of 1867 with Russia for the purchase of Alaska. In the bill carrying the necessary appropriation of \$7,200,000 the House inserted an amendment which, after reciting that the stipulations of the treaty were among the subjects over which Congress had jurisdiction and that it was necessary that the consent of Congress be given to such stipulations before they could be carried into effect, declared "That the assent of Congress is hereby given to the stipulations of said treaty."<sup>1</sup> The Senate, however, declined to concur in this amendment, and a compromise was agreed upon of such character that, as finally enacted, the bill merely appropriated the necessary sum to fulfil the stipulations of the treaty, since they "cannot be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary."<sup>2</sup> The Senate thus formally conceded that, as far as appropriations, at all events, are concerned, treaties are not fully self-executing.

That an international responsibility rests upon the Government to fulfil its treaty stipulations, that a moral obligation rests upon the legislative body to enact auxiliary legislation carrying necessary appropriations, and that

Congress, holding that a treaty cannot change revenue laws without the sanction of the House. House rept. 4177, 49th Cong., 2d sess. (1887), reprinted as Chap. XI of H. St. G. Tucker's *Limitations on the Treaty-Making Power*. Cf. House rept. 2680, 48th Cong., 2d sess., "Power of President to Negotiate Treaties With Foreign Governments." The House Committee on Foreign Affairs submitted a report in 1881, however, advising against the adoption of a resolution which declared that the treaty-making power "does not extend to treaties which affect the revenue, or require the appropriation of money to execute them" on the ground that the words "all bills for raising revenue" in section 7 of article I of the Constitution do not embrace treaties. House rept. 225, 46th Cong., 3d sess. Hinds, *Precedents*, II, 989-90. But see Senate doc. 206, 57th Cong., 2d sess., p. 9.

<sup>1</sup> House Journal, 40th Cong., 2d sess., p. 1064.

<sup>2</sup> 15 Stat. at L., 198. See also Crandall, *op. cit.*, 176; Moore, *Digest of Internat. Law*, V, 226-229, quoting Wharton, *Internat. Law Digest*, II, 21-23. See also majority and minority reports of the House Committee on Foreign Affairs. House rept. 37, 40th Cong., 2d sess.

failure at this point constitutes a just cause of war, was asserted not only by President Jackson but by the House of Representatives, in 1835, upon the failure of the French Chamber of Deputies to appropriate sums necessary to pay the claims of American citizens under the French convention of 1831.<sup>1</sup> The same position was taken by the executive department of our Government when the Spanish Cortes failed to pass the appropriation necessary to pay a claim—the “Mora Claim”—which, in 1886, the Spanish Council of Ministers had agreed to settle.<sup>2</sup> In this case, Congress, also, by joint resolution, requested the President to insist upon payment.<sup>3</sup>

#### TREATIES AFFECTING THE REVENUE LAWS

A second phase of financial enforcement legislation arises in connection with treaties whose provisions purport to affect the custom revenues. These revenues are in a special sense under the control of Congress, in view of both the provision of the Constitution that “all bills for raising revenue shall originate in the House of Representatives” and the grant to Congress in that instrument of the power to regulate commerce with foreign nations. The control of Congress over the subject, however, is not so exclusive as to prevent the treaty-making power from entering into compacts which purport to affect the custom revenues. This is, indeed, a usual and proper subject of international negotiation, and many compacts upon it, especially relating to commercial reciprocity, have been entered into. The question which here arises, however, is whether such international agreements modify existing tariff laws of their own force or whether they require Congressional legisla-

<sup>1</sup> Reports of Committees, No. 133, 23rd Congress, 2d sess., *Debates*, 23rd Cong., 2d sess., 1531-1634; Crandall, *op. cit.*, 174; Hinds, *Precedents*, II, 975. In his message to Congress on Dec. 1, 1834, Jackson recommended “that a law be passed authorizing reprisals upon French property in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers.” Richardson, *Mess. and Pap. of the Presidents*, III, 106.

<sup>2</sup> *For. Rels. of U. S.*, 1895, part II, pp. 1162 ff.; J. B. Moore in *Polit. Sci. Quar.*, XX, 403-407 (Sept., 1905).

<sup>3</sup> 28 Stat. at L., 975; *For. Rels.*, 1894, app. I, 364-450.

tion to carry them into effect. As we have seen, the general rule laid down by the courts is that a treaty which is duly entered into, which does not violate the Constitution, and which relates to a proper subject of international negotiation, supersedes prior conflicting acts of Congress and will be so regarded by the courts, in so far as its provisions are self-executing. To this general rule, however, an apparent exception arises in the case of treaty provisions which conflict with prior acts of Congress fixing the rates of duty upon goods imported into the country, especially when considerable changes are made. Commercial reciprocity treaties commonly provide for a reduction of tariff rates in certain contingencies. But such rates are not, as a rule, set aside automatically by treaty, for Congressional legislation is necessary in order to effect that end.

The question as to the character of legislation appropriate for this purpose came up prominently in connection with the enforcement of the reciprocal commercial convention of 1815 with Great Britain. The Senate inclined to the view that the treaty was self-executing and that, at most, an act of Congress merely *declaring* the treaty in effect was all that was necessary. The House of Representatives, on the other hand, while not denying the validity of the treaty, proposed to pass a measure reiterating in detail the provisions of the instrument relating to tariff rates, on the theory that such legislation was necessary to give these provisions full force. Conference committees succeeded in arranging a compromise of such character that, as finally passed, the bill read as follows: "Be it enacted and declared that so much of any act as imposes a higher duty of tonnage, or of impost on vessels and articles imported in vessels of Great Britain than on vessels and articles imported in vessels of the United States, contrary" to the convention of 1815 "be, from and after the date of the ratification of the said convention and during the continuance



thereof deemed and taken to be of no force or effect."<sup>1</sup>

Although in this instance the matter was settled by compromise, the tendency has since been, more and more, to accept the views of the House, notwithstanding that individual opinions to the contrary have sometimes been expressed. In 1844 Rufus Choate, in reporting adversely for the Senate Committee on Foreign Relations upon a proposed reciprocity convention with the German Zollverein, observed that the convention purported to change duties which had been laid by law, and that the Committee was "not prepared to sanction so large an innovation upon ancient and uniform practice in respect of the department of government by which duties on imports shall be imposed. . . . In the judgment of the Committee the legislature is the department of government by which commerce should be regulated and laws of revenue be passed."<sup>2</sup>

An international convention of 1904, to which the United States was a party, provided that hospital ships should be exempted, in time of war, from all port dues and taxes. It was considered by our Government, however, that the agreement could not be carried into effect in this country without Congressional legislation. Consequently the Secretary of State recommended the passage of a bill for the purpose of carrying out the treaty, and the House Committee on Foreign Affairs, in its report, declared such legislation to be necessary.<sup>3</sup>

The question under discussion has come before the courts in connection with the determination of the date when the tariff rates provided for by a convention go into effect.

<sup>1</sup> 3 Stat. at L., 255; see also Moore, *Digest of Internat. Law*, V, 223; Crandall, *op. cit.*, 184-188; Hinds, *Precedents*, II, 975-979.

<sup>2</sup> Senate doc. 231, 56th Cong., 2d sess., VII, 36; Hinds, *Precedents*, II, 998-1001. Of the view thus expressed, John C. Calhoun, while Secretary of State, declared: "If this be the true view of the treaty-making power it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution." Moore, *Digest of Internat. Law*, V, 164. Political hostility to President Tyler probably had some influence upon the attitude of the Senate committee.

<sup>3</sup> Malloy, *Treaties, etc.*, 2137; 35 Stat. at L., pt. 1, p. 46; 35 Stat. at L., pt. 2, pp. 1854-62; House rept. 533, 60th Cong., 1st sess. (1908).

Attorney-General Cushing ruled in 1854 that the provisions of the reciprocity convention of 1831 with France went into effect on the date of the exchange of ratifications as provided in the convention, on the theory that such provisions were self-executing and therefore required no Congressional legislation.<sup>1</sup> In view of the doubts that have arisen on the subject, however, it has become customary to insert clauses in such conventions stipulating that the instrument shall go into effect only when approved by Congress, or when appropriate enforcement legislation has been enacted. "If the treaty-making power," said Attorney-General Miller, "in all treaties whose execution requires the exercise of powers committed to Congress, should uniformly provide in the treaties for their proper submission to Congress before they should be effective, consequences might be avoided which may jeopardize the credit of the nation."<sup>2</sup> This principle has been acted upon in numerous instances. Thus, in the Hawaiian reciprocity convention of 1875 it is provided that the agreement shall not take effect "until a law to carry it into operation shall have been passed by the Congress of the United States."<sup>3</sup>

In the case of the Cuban reciprocity convention of 1903, no such provision was at first included. But the Senate, in advising and consenting to ratification, proposed and secured the adoption of an amendment providing that the convention should not take effect until it had been approved by Congress;<sup>4</sup> and the Supreme Court subsequently held

<sup>1</sup>6 Op. Atty.-Gen., 295.

<sup>2</sup>19 *Ibid.*, p. 278.

<sup>3</sup>Malloy, *Treaties*, etc., 917. Similar provisions were inserted in the British and Mexican reciprocity conventions of 1854 and 1883 respectively, and in the British treaty of 1871. Malloy, *op. cit.*, 672, 713, 1151. On the history of the Hawaiian treaty, see Sen. doc. 206, 57th Cong., 2d sess.

<sup>4</sup>Malloy, *Treaties*, etc., 357; Sen. doc. 47, 57th Cong., 2d sess., "Jurisdiction of Senate to Act upon Reciprocity Treaties." The Senate had previously inserted in the Mexican reciprocity convention of 1883 a similar provision, but in that case had qualified its concession by providing also that enforcement legislation should be enacted within twelve months from the date of the exchange of ratification. Malloy, *ibid.*, 1151; and see Minority Report of Ways and Means Committee of the House regarding the enforcement of the treaty. House rept. 2615, 49th Cong., 1st sess., pp. 15-16.

that the convention went into effect on the date of the passage of the act of Congress approving the convention, despite the fact that the convention also contained a provision that it should go into effect ten days after the exchange of ratifications.<sup>1</sup>

In this same act of Congress a proviso was inserted to the effect that "nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that customs duties can be changed otherwise than by an act of Congress originating in said House."<sup>2</sup> The act also provided that, while the Cuban convention was in force, no sugar, the product of any other foreign country, should be admitted by treaty or convention into the United States at a lower rate of duty than that provided by the tariff act of 1897.<sup>3</sup> This latter provision was objected to by the minority of the House Committee on Ways and Means, on the ground that "Congress has no right to attempt to bind the treaty-making power of the United States in a succeeding Congress or under a succeeding administration."<sup>4</sup> The minority protest, however, was unavailing, and the provision may be taken as fairly indicating the attitude of Congress upon the operation of the treaty-making power over the subject of tariff duties on foreign commerce. A corresponding attempt on the part of the treaty-making body to regulate custom duties and to forbid Congress to alter such regulations would, as to such prohibition, be clearly *ultra vires*.<sup>5</sup>

<sup>1</sup> U. S. v. Am. Sugar Refining Co., 202 U. S., 563 (1905).

<sup>2</sup> 33 Stat. at L., pt. 1, p. 3.

<sup>3</sup> *Ibid.* See the debate on the bill in the House and especially in the Senate. Cong. Record, 58th Cong., 1st and 2d sessions. Hinds, *Precedents*, II, 996-8.

<sup>4</sup> House rept. 1, pt. 2, 58th Cong., 1st sess., p. 2.

<sup>5</sup> Cf. Fuller, C. J., in *Downes v. Bidwell*, 182 U. S., 370. In this case four justices held that the treaty power alone cannot incorporate ceded territory into the United States. This position is criticized by Willoughby on the ground that it is inconsistent with the principle that the treaty power and the law-making power are coördinate in authority. *Constitutional Law of U. S.*, I, 430. It is to be observed, however, that these two powers are not, in every case, entirely equal and coördinate, since a treaty may sometimes require ancillary legislation in order to put it into effect, because it is not self-executing. See cases cited in note 1, p. 456, *supra*.

The general control which Congress has assumed to exercise over the matter of custom revenues is also shown by the incorporation in various tariff acts, *e.g.*, the act of 1897, of provisions which purport to grant authority to the treaty-making body to enter into custom agreements. From the strictly legal point of view, no such grant is necessary; for the treaty-making body is competent to conclude agreements affecting the custom revenues which are valid internationally,<sup>1</sup> although not necessarily self-executing. But from the practical point of view, it is conceded by the political departments of the Government that, in practice, the House of Representatives should be consulted and that Congress should have some influence, albeit indirect, in making, as well as in enforcing, agreements relating to the custom revenues.

It thus appears that in the case of treaties relating to certain matters which, under the Constitution, are delegated to the legislative control of Congress, the treaty-making power has conceded that a treaty should not be put into effect until it has been approved by Congress. This has been agreed to particularly in relation to the regulation of customs revenue, probably for the reason that the exercise of this power is a bone of contention between political parties. The need of party cohesion on tariff policy has doubtless influenced the treaty-making power in its concession to Congress.<sup>2</sup> This, however, has not been the sole influence in this direction. Indeed, the tendency can be discovered in relation to treaties dealing with matters of no financial or political significance.<sup>3</sup>

<sup>1</sup> Cf. *Whitney v. Robertson*, 124 U. S., 190.

<sup>2</sup> A practical consideration operating in this direction was thus indicated by President Cleveland: "As a further objection, it is evident that tariff regulation by treaty diminishes that independent control over its own revenues which is essential for the safety and welfare of any government. Emergency calling for an increase of taxation may at any time arise, and no engagement with a foreign power should exist to hamper the action of the government." Annual Message, Dec. 8, 1885. *For. Rels.*, 1885, XVI, quoted by Moore, *Digest of Internat. Law*, V, 272.

<sup>3</sup> Cf. the provision of the Migratory Bird Convention of 1916 between the United States and Great Britain: "The high contracting powers agree them-

In order to avoid misunderstandings with foreign nations and accusations of bad faith by such nations, one of two practical expedients should be resorted to in all cases in which Congressional legislation is necessary to put a treaty into effect: (1) the treaty should contain an express provision that it is to go into operation only when Congress shall have indicated its approval by passing enforcement legislation; (2) the exchange of ratifications should be withheld by the President until such legislation has been enacted. In order that the treaty power as a whole shall be fully effective, it is desirable, if not essential, that there be good working relations on these lines between (a) the President and Senate, *i.e.*, the treaty-making power and (b) Congress, *i.e.*, the treaty-enforcing authority.

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selves to take, or to propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present convention.”  
 39 Stat. at L., 1704.

## CHAPTER XXVI

### THE INTERPRETATION OF TREATIES

CLOSELY connected with the enforcement of treaties is their interpretation, for the authorities that enforce are usually required also to interpret—often, in fact, to interpret in the very act of enforcement.<sup>1</sup> On account of the limitations of human language, as well as because of the impossibility of foreseeing all the circumstances and sets of facts that may arise to affect a treaty's application, it frequently happens that doubts may justifiably be entertained as to the meaning and proper interpretation of binding international agreements.

#### INTERPRETATION BY THE POLITICAL DEPARTMENTS

In the United States interpretations are constantly being placed upon treaties by Congress, by the Executive, and by the courts. In passing legislation for the enforcement of treaty stipulations, Congress must necessarily proceed in accordance with its views of the meaning of these stipulations, and it will often incorporate these views in the legislation which it enacts. Thus in passing the Panama Canal Act of 1912 providing for the exemption of American vessels engaged in the coastwise trade from the payment of tolls on going through the Canal,<sup>2</sup> Congress gave evidence of its view that such an exemption was in accordance with the provisions of the Hay-Pauncefote Treaty. Of course, as hitherto pointed out, Congress can constitutionally enact

<sup>1</sup> "Interpretation" of treaties is sometimes distinguished from "construction" of treaties, but for our purposes the two terms may be considered synonymous.

<sup>2</sup> 37 Stat. at L., pt. I, p. 560.

legislation which abrogates and supersedes prior treaties of binding international force. But such conflict between treaties and acts of Congress is not to be presumed so long as the apparently conflicting provisions can possibly be reconciled. Until the contrary conclusively appears, the presumption is that Congress will guide its action in strict accordance with treaty obligations.

The executive department of the Government, likewise, is frequently called upon to place an interpretation upon a treaty. Thus in 1912 our Navy Department, being desirous of securing the sole right of erecting and operating wireless telegraph stations in the Canal Zone and on the Isthmus of Panama, suggested to the State Department that negotiations be entered into with the Government of Panama looking to the necessary concessions for this purpose. The State Department, however, in accordance with the opinion of its solicitor, decided that such negotiations were unnecessary, inasmuch as, under the Hay-Bunau-Varilla Treaty of 1903 with Panama, our Government already enjoyed full and exclusive right and authority to erect and operate wireless telegraph stations, not only in the Canal Zone, but on the Isthmus of Panama.<sup>1</sup> Again, the same treaty was interpreted in 1907 by the Secretary of War as conferring upon the United States jurisdiction over the waters of Manzanillo Bay below the mean low-water mark; and in accordance with such interpretation the President granted a permit to a certain company to lay a cable in these waters.<sup>2</sup>

The Rush-Bagot agreement of 1817 limited the naval force to be maintained by the United States on the Great Lakes to three vessels of a burden not exceeding one hundred tons each. This restriction was interpreted by our Government, however, as not applying to the revenue service, and in 1892 we had on Lake Michigan in that service an

<sup>1</sup> See the opinion of the Solicitor, *For. Rels. of the U. S.*, 1912.

<sup>2</sup> *For. Rels. of U. S.*, 1908, p. 679.

armed vessel of nearly five hundred tons.<sup>1</sup> An executive interpretation of a treaty which profoundly influenced our national history at an early period was that made by President Washington when he issued his neutrality proclamation of 1793, thereby construing our treaty of alliance of 1778 with France as not requiring us to assist that nation in the war in which she was now engaged.

Many of the communications which pass between our State Department and the corresponding department or diplomatic representatives of other governments with which we have treaty relations have to do with the interpretation of treaties, either indicating the construction placed upon them by our Government or combating that placed upon them by the foreign government, or both.<sup>2</sup> In many instances the State Department puts its own interpretation on treaties whose meaning is disputed. But it sometimes adopts as its interpretation that indicated by other organs of the Government, such as the Supreme Court, the Attorney-General, or the Secretary of War.<sup>3</sup>

The published volumes of the Foreign Relations of the United States are full of diplomatic exchanges revolving around the disputed interpretation of treaties. A Secretary of State, in carrying on a diplomatic discussion over the disputed interpretation of a treaty, is usually loath to concede that the counter-arguments of the foreign government are well grounded, even when he realizes such to be the case, lest he be accused of weakness in maintaining our national rights. Occasionally, however, under circumstances of this sort, our Secretary of State has had the grace

<sup>1</sup> Senate Ex. Doc. 9, 52d Cong., 2d sess., p. 31; Moore's *Digest of Internat. Law*, I, 696; Bigelow, *Breaches of Anglo-American Treaties*, 34.

<sup>2</sup> See *For. Rels. of U. S., passim, e.g.*, 1873, p. 720; 1883, p. 418; 1899, p. 746; 1900, p. 914; 1910, pp. 658, 664, 852; 1911, p. 673; 1912, p. 1221.

<sup>3</sup> *For Rels. of U. S.*, 1910, p. 666; *ibid.*, 1908, pp. 595, 679. In 1888 Secretary Bayard declined to furnish the Swiss minister with our Government's interpretation of the trade-mark convention, on the ground that the Supreme Court had left untouched "the whole question of the treaty-making power of the General Government over trade-marks and the duty of Congress to pass any laws necessary to carry such treaties into effect." *For Rels. of U. S.*, 1888, part II, p. 1541.



to admit the justness of the contention of the foreign government. Thus in 1898 the Government of Switzerland, by virtue of the most-favored-nation clause of our treaty of 1850 with that state, claimed privileges for Swiss imports into the United States such as we had recently granted to imports from France under the terms of a reciprocity convention. Secretary Day denied the justice of the claim on the ground that a reciprocity treaty is a bargain and not a favor, and that the United States "has consistently maintained the view that the most-favored-nation clause does not entitle a third government to demand the benefits of a special agreement of reciprocity."<sup>1</sup> Shortly afterwards, however, Mr. Day's successor, Mr. Hay, while agreeing with his predecessor that the construction which for almost a century had been uniformly given by our Government to most-favored-nation clauses was that, in the language of John Quincy Adams, they "only covered gratuitous favors, and did not touch concessions for equivalents," nevertheless admitted that when the Swiss treaty of 1850 was signed it was the understanding on both sides that the United States was making an exception to its otherwise uniform policy in this respect.<sup>2</sup> We therefore acceded to the Swiss claim; although, in view of the Swiss construction of the most-favored-nation clauses of the treaty, we shortly afterwards exercised the option allowed by the treaty itself of giving notice of our intention to discontinue the operation of those clauses.

If the executive interpretation of a treaty may vary from one Secretary of State to another in the same administration, it follows, *a fortiori*, that such interpretation may vary from

<sup>1</sup> *For. Rels. of U. S.*, 1899, p. 741. This interpretation of the most-favored-nation clause has been sanctioned, not only by the executive department, but also by the courts. Thus the Supreme Court has held that such a clause in our treaty of 1858 with Denmark does not require us to extend to that country without compensation privileges which we conceded, in exchange for valuable concessions, to the Hawaiian Islands by the treaty of 1875. *Bartram v. Robertson*, 122 U. S., 116.

<sup>2</sup> *Ibid.*, 746-8.

one administration to another. Thus in the case of the act of Congress of 1912 exempting our coastwise vessels from the payment of tolls on going through the Panama Canal, Secretary Knox, in notes to the British Government, argued that this provision was not a violation of the Hay-Pauncefote Treaty, and President Taft took the same position. "After full examination of the Hay-Pauncefote treaty," said the President, "I feel confident that the exemption of the coastwise vessels of the United States from tolls and the imposition of tolls on vessels of all nations engaged in the foreign trade is not a violation of the treaty."<sup>1</sup> Within two years, however, President Wilson declared in an address to Congress that the exemption of our coastwise vessels "is in plain contravention of the [Hay-Pauncefote] treaty." We should not, he added, interpret "with a too strained or refined reading the words of our own promises just because we have power enough to give us leave to read them as we please. . . . We ought to reverse our action without raising the question whether we were right or wrong."<sup>2</sup> At Wilson's solicitation, Congress passed an act which repealed the measure of 1912 in so far as it granted exemption to our vessels.<sup>3</sup>

The variation in the interpretations thus placed upon the treaty is to be ascribed mainly to the fact that such interpretations were made by the political departments of the Government. Had the treaty provisions in this instance been subjected to judicial interpretation, such variation would have been highly improbable, on account of the greater permanency of the judiciary and the operation of the rule of *stare decisis*.

<sup>1</sup> House doc. 914, 62d Cong., 2d sess., p. 1 (August 19, 1912), and cf. Sen. doc. 11, 63rd Cong., 1st sess.

<sup>2</sup> House doc. 813, 63rd Cong., 2d sess. (March 5, 1914).

<sup>3</sup> 38 Stat. at L., pt. 1, p. 386. In repealing this provision, however, Congress specified that its action should "not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty . . . to discriminate in favor of its vessels" in the matter of tolls.

## JUDICIAL INTERPRETATION

The Constitution provides that the judicial power vested in the courts of the United States shall extend to all cases in law and equity arising under treaties made under United States authority;<sup>1</sup> and, as already pointed out, in cases involving the construction of a treaty the Supreme Court has jurisdiction by way of appeal or writ of error from the decisions of the federal district courts and from those of the highest court of any state.<sup>2</sup> In exercising such power, it may easily become necessary for the courts to say what given treaties mean. It is not always feasible, however, to bring before the courts for adjudication the provisions of treaties about whose interpretation there is doubt. Thus the question whether a correct interpretation of the treaty of alliance with France permitted us to remain neutral in 1793 was not one upon which the courts are competent to pass, since it is a political question and involves a matter of public political policy. Many treaties are of a strictly public character, pledging the contracting powers to take certain action in their governmental capacity upon the arising of a given contingency; and the question whether a particular circumstance is such a contingency as to require the action contemplated by the treaty is political in its nature, and the courts will not undertake to decide it. When a treaty stipulates action on the part of one of the contracting parties in its governmental capacity, and an allegation of non-performance of the stipulation gives rise to a dispute between the parties as to the correct interpretation of the treaty, this again is a political question not suitable for submission to the national courts of either party. If the question is not capable of settlement by diplomatic negotiations, it may be left to arbitration or may be regarded as

<sup>1</sup> Art. III, sect. 2.

<sup>2</sup> Judicial Code of U. S., sects. 237-2.

a *casus belli*.<sup>1</sup> Thus, as the Supreme Court has declared, "when the terms of the [treaty] stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."<sup>2</sup>

On public rights, the courts follow the political departments of the Government, both as to the interpretation of a treaty and as to whether an alleged treaty is actually in force. Thus, as already indicated, they defer to the judgment of the executive department of the Government as to whether a treaty, despite its breach by the other party, is still in force.<sup>3</sup> Furthermore, if Congress disregards a treaty by passing a law in conflict with it, the courts are bound to consider the treaty as no longer law of the land.<sup>4</sup>

When, on the other hand, treaties confer private rights on citizens or subjects of the contracting powers—rights such as are enforceable in a court of justice—the courts accept such treaties as rules of decision and place upon them their own interpretation, in so far as the treaties are self-executing, *i.e.*, in the degree in which they presently establish such rights rather than merely promise them. Thus in 1890 the question arose whether a French citizen is entitled to own, by inheritance from an American citizen, property situated in the District of Columbia. The treaty of 1853 with France granted this right only with reference to property situated in "all the states of the Union."<sup>5</sup> After lay-

<sup>1</sup> Cf. the case of our dispute with Great Britain over the seal fisheries in the Behring Sea, and see *In re Cooper*, 143 U. S., 472, and Baldwin, *American Judiciary*, 37-41.

<sup>2</sup> *Foster v. Neilson*, 2 Pet., 314. It results from the above reasoning that there is no conflict between treaties agreeing to international arbitration of disputes arising from the interpretation of treaties and Art. III, Sect. 1, of the Constitution providing that the judicial power vested in the courts of the United States shall extend to all cases in law and equity arising under treaties made under the nation's authority.

<sup>3</sup> *Charlton v. Kelly*, 229 U. S., 447.

<sup>4</sup> *Botiller v. Dominguez*, 130 U. S., 238; *The Cherokee Tobacco*, 1 Wall., 616; *Head Money Cases*, 112 U. S., 580; *Whitney v. Robertson*, 124 U. S., 190.

<sup>5</sup> Malloy, *Treaties*, etc., 531.

ing down the rule that "it is a general principle of construction with respect to treaties that they should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them," the Supreme Court proceeded to construe the clause in question to be broad enough to include the District of Columbia.<sup>1</sup>

In cases in which private rights are involved a prior executive interpretation of a treaty would not be considered necessarily binding upon the courts;<sup>2</sup> nor, in such cases, would the courts decline to give effect to treaty provisions establishing private rights, even though the judicial constructions were resisted by the political department of the Government in argument before the court.<sup>3</sup> On the other hand, when private rights have been determined by the Supreme Court through the interpretation of a treaty, the executive department of the Government considers such interpretation conclusive as to the treaty's meaning.<sup>4</sup>

#### TREATY SPECIFICATION OF METHOD OF INTERPRETATION

Treaties sometimes contain provisions indicating the meaning or interpretation of any of their terms which would otherwise be doubtful or ambiguous. Such interpretative provisions are sometimes inserted by the Senate with a view to indicating the understanding of that body as to the meaning to be attached to the terms of a treaty for whose ratification its advice and consent is asked. If such Senate "reservations" are accepted by the President and by the other contracting party, they become as valid and binding as any

<sup>1</sup> *De Geofroy v. Riggs*, 133 U. S., 258, at p. 271. The court found support for this construction in an act of Congress. Cf. *Tucker v. Alexandroff*, 183 U. S., 424, where the court declared that "a convention in a treaty which is operative upon both signatory powers and is intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose."

<sup>2</sup> *For. Rels. of U. S.*, 1910, p. 732.

<sup>3</sup> *The La Nina*, 75 Fed., 513; Baldwin, *American Judiciary*, 40.

<sup>4</sup> See *Maiorano v. B. & O. R. R. Co.*, 217 U. S., 268, and *For. Rels. of U. S.*, 1910, p. 666.

other terms of the treaty.<sup>1</sup> Some of the proposed Senate reservations to the Treaty of Versailles (including the Covenant of the League of Nations) were interpretations indicating the meaning which the Senate attached to certain of the treaty's provisions.<sup>2</sup> The same may be said of Senate reservations to other treaties and general international conventions, such as those of The Hague and Algeciras. In order to be binding as parts of a treaty, such reservations must be accepted by the President, and also by the other contracting party, or parties, although in the latter case consent may be given only tacitly. An interpretative declaration made by the Secretary of State and the representative of the foreign government at the time of the exchange of ratifications of a treaty, if not submitted to or accepted by the President and the Senate, will not necessarily be considered binding upon our Government.<sup>3</sup>

Treaties sometimes contain provisions indicating the method to be pursued in settling any dispute which may arise as to their interpretation. Thus the convention of

<sup>1</sup> Thus in advising and consenting to the Korean treaty of 1882 the Senate passed a resolution stating its understanding of the meaning of a clause in the instrument, and requesting the President to communicate such interpretation to the Korean Government, on the exchange of ratifications, as the sense in which the United States understood the same (Malloy, *Treaties*, I, 340). This was done; the interpretation was accepted by the Korean representative (*For. Rels. of U. S.*, 1883, p. 242); and it was thereupon embodied in the President's proclamation of the treaty (23 Stat. at L., 725). Cf. a similar case of Senatorial interpretation in the Danish treaty of 1916 (39 Stat. at L., 1716-17), and the proposed reservations to the Treaty of Versailles.

<sup>2</sup> For example, the reservation which provided that, in the event of withdrawal from the League, the United States should be the sole judge as to whether all of its international obligations and all of its obligations under the Covenant had been fulfilled. Cong. Record, Nov. 19, 1919, vol. 58, p. 9289.

<sup>3</sup> A case of this sort occurred in connection with the Clayton-Bulwer Treaty of 1850. On the exchange of ratifications Bulwer filed in the State Department a declaration that the treaty was made on the part of the British Government on the understanding that it did not apply to the British settlement at Honduras. Secretary Clayton answered that he so understood the treaty, but that he must not be understood either to affirm or to deny the British title in that region. The declaration was not made to or accepted by the President and Senate. Consequently, in spite of it, Secretary Frelinghuysen maintained in 1882 that Great Britain had no right to exercise dominion anywhere in Central America, and that if she continued to do so, the treaty was voidable at the pleasure of the United States. *For. Rels. of U. S.*, 1882, p. 276; Moore's *Digest of Internat. Law*, V, 206.

1916 in which Denmark ceded the Danish West Indies to the United States provided: "In case of difference of opinion arising between the high contracting parties in regard to the interpretation or application of this convention, such differences, if they cannot be regulated through diplomatic negotiations, shall be submitted for arbitration to the permanent court of arbitration at the Hague."<sup>1</sup>

Again, special treaties have sometimes been entered into with a view to providing a means of interpreting treaties in general. Thus in 1908 we entered into several arbitration conventions in which we undertook to submit, by special agreement, to the permanent court of arbitration at The Hague such international differences as were of a legal nature or related to the interpretation of treaties between the contracting parties, and could not be settled by diplomacy.<sup>2</sup>

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Foster, J. W., *Practice of Diplomacy* (Boston, 1906), Chap. XIV.  
Moore, J. B., *Digest of International Law* (Washington, 1906), V, 249-319.

<sup>1</sup> 39 Stat. at L., pt. 2, p. 1714.

<sup>2</sup> See, e.g., Malloy, *Treaties, etc.*, 814. The United States has frequently resorted to arbitration to settle disputes involving the interpretation of treaties. A leading instance is the North Atlantic Coast Fisheries Arbitration, which had for its object to determine the meaning of the phrase "coasts, bays, harbors, and creeks" in British North America, as employed in our treaty with Great Britain in 1818 to denote the places where the right of the inhabitants of the United States to fish was recognized. For the proceedings in this arbitration before the Hague court, see Senate doc. 870, 61st Cong., 3d sess. (12 vols.), and for a brief account see a paper by Robert Lansing, of counsel for the United States, in *Proceedings of the Lake Mohonk Conference on International Arbitration*, 1911, pp. 242-9. For other examples, see Moore's *International Arbitrations*.

## CHAPTER XXVII

### THE TERMINATION OF TREATIES

IN taking up the various methods by which treaties may be terminated the fact must continue to be borne in mind that a treaty may be considered from two points of view, *viz.*, as an international contract and as a law of the land. These aspects are two sides of the same shield and cannot be wholly dissociated. Whether looked at from the internal or from the external point of view, however, the normal method of terminating a treaty which contains no provision for its own termination is the exercise of the same power that made the treaty in the first place. This is sometimes effected by making a new treaty expressly repealing or superseding a former one. Thus the Hay-Pauncefote Treaty of 1901, entered into for the purpose of facilitating the construction of a trans-isthmian canal, expressly superseded the Clayton-Bulwer Treaty of 1850 relating to the same matter.<sup>1</sup> Again, by the treaty of 1902 with Spain all "treaties, agreements, conventions and contracts" made by the United States with that country prior to the Treaty of Paris were, with the exception of the claims convention of 1834, "expressly abrogated and annulled."<sup>2</sup> A treaty of 1857 with Japan provided that Americans committing offenses in that country should be tried by the American consul and punished according to American laws. This provision was not superseded by the treaty of the following year;<sup>3</sup> but in 1899, under the terms of a treaty of 1894, the extra-territorial jurisdiction of American consuls over

<sup>1</sup> Malloy, *Treaties*, etc., 782.

<sup>2</sup> *Ibid.*, 1710. To some extent these prior treaties had already been destroyed, or at least suspended, by the war of 1898.

<sup>3</sup> *Ross v. McIntyre (In re Ross)*, 140 U. S., 453.



the offenses of Americans in Japan was terminated.<sup>1</sup> In 1911 the treaty of 1894 was, in turn, superseded by a new treaty.<sup>2</sup>

A treaty may be terminated, not only by an express repeal contained in a later treaty, but by the making of a later treaty containing provisions which are inconsistent with those of the earlier instrument. In such a case the later evidence of the will of the treaty-making body prevails over the earlier. Thus the Webster-Ashburton Treaty of 1842 superseded our treaty of 1827 with Great Britain, in so far as it was inconsistent with the terms of that instrument.<sup>3</sup> Treaties are also usually regarded as terminated when one or more of the contracting parties becomes extinct through dissolution or absorption by another state. In the latter case the termination is sometimes recognized by a new treaty with the absorbing state; and of course some or all of the provisions of the extinguished treaty may be continued. Thus by a treaty of 1904 with France the United States renounced the right of invoking the stipulations of the treaties of 1797 and 1824 with Tunis.<sup>4</sup> As will be observed, these instances of the termination or supersession of one treaty by another arise primarily from the view of a treaty as an international compact.

Treaties may also come to be regarded as terminated for the reason that their provisions have been fully executed. An example is a treaty for the cession of territory for a given compensation, when the transfer of sovereignty over

<sup>1</sup> Malloy, *Treaties*, etc., 1035.

<sup>2</sup> Garfield Charles, *Treaties, Conventions*, etc., Sen. doc. 1063, 62nd. Cong., 3rd sess., p. 77.

<sup>3</sup> For other examples, see *Notes to Treaties and Conventions between the United States and Other Powers, 1776-1887* (1889), p. 1236; Moore, *Digest of Internat. Law*, V, 363-4.

<sup>4</sup> Malloy, *Treaties*, etc., 545. France, upon annexing Madagascar in 1896, intimated that the maintenance of treaties between the United States and the African island was inconsistent with the new order of things, but that she would extend to Madagascar "the whole of the conventions applicable to the government or citizens of the United States in France and in French possessions." Moore, *Digest of Internat. Law*, V, 347.

the territory has been made and the sum agreed upon has been paid.

Although some early treaties were on their face permanent, if not perpetual, comparatively few stipulating obligations of continuing validity are now made which do not contain some provision for their termination or modification. Some run for a term of years, at whose expiration they automatically lapse unless expressly renewed. Others are terminable within a certain time after due notice is given; and either party may give such notice, in some cases, at any time after the treaty has gone into effect and in others, upon the expiration of a stipulated term of years. This method of termination is called a "denunciation."

As a rule, a treaty does not itself designate the officer or organ of our Government in whom is vested the authority to give the stipulated notice, for this is a matter of municipal law and not an appropriate subject of international agreement. Naturally, therefore, there has been some difference of opinion as to what officer or agency is to be regarded as possessing the power. It falls, of course, to the President, or the Secretary of State or other agent acting under the President's orders, to transmit the notice; for the executive is the only branch which has the right to carry on correspondence with foreign governments. But the important question remains whether the President may act on his own initiative and authority in giving such notice, or whether he can act only when authorized by Congress, or perhaps by the Senate.

#### TERMINATION BY EXECUTIVE ACTION

In at least one instance the President acted on his own initiative and without authorization or ratification by any other branch of the Government. This occurred in 1899, when, in view of the construction placed by Switzerland upon the most-favored-nation clauses of our treaty of 1850

with that country, Secretary Hay instructed our minister at Berne to deliver to the President of the Swiss Confederation notice of our intention to arrest the operation of those clauses of the treaty; and such notice of denunciation was accordingly delivered and accepted.<sup>1</sup>

Occasionally the President has taken the initiative in denouncing a treaty, but his act has subsequently been approved or "ratified" by a joint resolution of Congress. In 1911 the failure of Russia to give protection, under the terms of our treaty of 1832 with that country, to American citizens of Hebrew descent residing therein and holding duly issued American passports, led our Government to denounce the treaty mentioned, in accordance with its provisions. A joint resolution for this purpose, couched in terms which were unacceptable to the President, passed the House of Representatives. Before it was acted upon by the Senate, however, the Secretary of State, by order of the President, directed our ambassador at St. Petersburg to notify the Russian Government of our intention to terminate the treaty. This notification was delivered on December 17, and on the following day President Taft addressed a message to the Senate informing that body of his action and stating: "I now communicate this action to the Senate, as a part of the treaty-making power of this Government, with a view to its ratification and approval."<sup>2</sup> The President's course indicated his belief (1) that he had a right to notify the foreign government of the denunciation of the treaty prior to any action by the Senate or by Congress authorizing him to do so; but (2) that subsequent approval by the Senate, as a part of the treaty-making power, was desirable, if not necessary; and (3) that the concurrence of the House of Representatives was unnecessary. The resolution which was finally passed, however, as a substitute

<sup>1</sup> *For. Rel. of U. S.*, 1899, pp. 754-7. Cf. Crandall, *Treaty-Making and Enforcement*, 642.

<sup>2</sup> Cong. Record, December 18, 1911, vol. 48, p. 453; House rept. 179, 62d Cong., 2d sess.; Sen. doc. 161, 62d Cong., 2d sess.

for the original House resolution, and accepted by the President was a joint resolution, which said simply that "the notice thus given by the President to the Government of Russia to terminate said treaty . . . is hereby adopted and ratified."<sup>1</sup> Since a joint resolution, as distinguished from a concurrent resolution, must be signed by the President, unless passed over his veto by a two-thirds vote, it follows that, in such a case, the President participates in approving his own act, although he cannot, in a strictly legal sense, take the initiative in doing so.

A case which throws light upon the location of the power of denunciation arose during the Civil War in connection with the Rush-Bagot convention of 1817 limiting our naval armament on the Great Lakes. In 1864 the House of Representatives passed a joint resolution with a view to terminating this arrangement. A few months later, and before any action had been taken on the resolution by the Senate, Secretary Seward instructed our ambassador at the Court of St. James to give the required six months' notice of termination. Four months after this notice was served Congress passed and the President approved a joint resolution which stated that the notice given by the President "is hereby adopted and ratified as if the same had been authorized by Congress." A month later, however, despite this legislative sanction of the executive notification of termination, our ambassador at London, acting under instructions from the Secretary of State, notified the British Government of our withdrawal of the previous notice of termination; and the agreement has since been considered by both governments as having continuing force and effect.<sup>2</sup> It does not appear that the executive notice of withdrawal of the previous notice of termination received any legislative sanction, or that the ratification by Congress of the notice of termina-

<sup>1</sup>37 Stat. at L., pt. 1, p. 627. See also Taft, *Chief Magistrate and His Powers*, 116-7; *For. Rels. of the U. S.*, 1911, pp. 695-9.

<sup>2</sup>J. W. Foster, *Report on the Rush-Bagot Agreement*, Senate Exec. Doc. 2, 52d Cong., 2d sess., pp. 24-32.

tion was ever rescinded, or, finally, that these circumstances were ever regarded by either government as affecting the validity of the withdrawal. Should Congress, however, enact legislation inconsistent with the terms and spirit of the agreement, a different question would be presented.

#### TREATY SPECIFICATION OF METHOD OF TERMINATION

The question may be raised whether the method of giving notice by our Government of the termination of a treaty may be indicated in the treaty itself. Is this a matter which the treaty-making power is competent to determine? Two things can be said. The first is that the method of notice is part of the internal arrangements of our Government and is not, therefore, an appropriate subject for treatment in an international instrument. The second is that, nevertheless, there is no legal obstacle to covering the matter in a treaty, provided, of course, that no attempt is made to lodge the power of giving notice of termination in the hands of an organ or branch of the Government which is not constitutionally competent to exercise it.

Article I of the Covenant of the League of Nations provides that any member may, after two years' notice of its intention to do so, withdraw from the League, provided it has fulfilled its international obligations and its obligations under the Covenant. The majority of the Senate voted in favor of a reservation to this provision which purported to confer discretionary power upon the two houses of Congress to give such notice by concurrent resolution. This reservation was perhaps not necessarily an attempt—on the supposition that concurrent resolutions need not be signed by the President<sup>1</sup>—to exclude him from participation in the procedure of withdrawal. But it was at least an effort to provide, through the exercise of the treaty power,

<sup>1</sup> Although apparently not in accordance with the Constitution, it is established by custom that in cases not involving legislation concurrent resolutions need not be signed by the President.

an alternative method of terminating the treaty of peace, in so far as that instrument concerned our membership in the League of Nations. The President could certainly not thus be stripped, even with his consent, of any constitutional power that he may have of effecting the termination of a treaty, and such a concurrent resolution would have no international validity if he were opposed to the policy involved. It would merely inform him of the wishes of Congress, which he could not be compelled against his will to carry out. Otherwise, hopeless confusion would result from divergent views of the two authorities upon such questions as the termination of the treaty or our withdrawal from the League.<sup>1</sup>

The further question arises whether it would be feasible to provide, by a stipulation in the treaty itself or otherwise, that a treaty should be terminated by notice given by a designated authority, not at any specified time, but upon the ascertainment by such authority of the existence of a certain state of facts. In the light of our constitutional law and practice, and on the analogy of the doctrine laid down by the Supreme Court in the case of *Field v. Clark*,<sup>2</sup> as well as by the Judiciary Committee of the Senate in its report on the proposed special treaty of 1919 with France,<sup>3</sup>

<sup>1</sup> For the Senatorial debate on the reservation, see Cong. Record, November 7-8, 1919, vol. 58, pp. 8543 ff., 8599 ff. Cf. President Wilson's letter to Senator Hitchcock, in which he said: "May I suggest that with regard to the possible withdrawal of the United States, it would be wise to give to the President the right to act upon a resolution of Congress in the matter of withdrawal? In other words, it would seem to be permissible and advisable that any resolution giving notice of withdrawal should be a joint rather than a concurrent resolution. I doubt whether the President can be deprived of his veto power under the Constitution, even with his own consent. The use of a joint resolution would permit the President, who is, of course, charged by the Constitution with the conduct of foreign policy, to merely exercise a voice in saying whether so important a step as withdrawal from the League of Nations should be accomplished by a majority or by a two-thirds vote. The Constitution itself providing that the legislative body (*sic*) was to be consulted in treaty-making and having prescribed a two-thirds vote in such cases, it seems to me that there should be no unnecessary departure from the method there indicated." Cong. Record, February 9, 1920, vol. 59, p. 2799.

<sup>2</sup> 143 U. S., 649.

<sup>3</sup> Cong. Record, Sept. 22, 1919, vol. 58, pp. 6644-5.

there would seem to be no objection to such procedure—especially if judgment or discretion is involved in the ascertainment of the existence of the given state of facts<sup>1</sup>—provided that the authority so designated should be the President, or the Secretary of State acting under his direction, and not some inappropriate agency, such as the governor of New York, or the mayor of Chicago, or even the two houses of Congress acting alone, by mere majority vote, without the concurrence of the President. As a matter of fact, when the President acts in giving notice of the termination of a treaty, even though under legislative authorization (provided that no exact time limit is specified), he does so upon his own ascertainment of the existence of a certain state of facts, *viz.*, that the circumstances of our internal affairs, as well as of our diplomatic relations, are propitious for the giving of such notice.

The proposed special treaty with France, drawn up in 1919, provided that it should “continue in force until, on the application of one of the parties to it, the council [of the League of Nations] acting, if need be, by a majority, agrees that the League itself affords sufficient protection.” The constitutionality of this treaty was affirmed by the Judiciary Committee of the Senate.<sup>2</sup> At first sight, this provision would seem to confer upon an international body the power of terminating, at its discretion, a treaty to which the United States is a party. The Council would doubtless have to use discretion in determining whether the League affords sufficient protection. But the action of the Council would not directly terminate the treaty nor prevent its renewal. The treaty merely adopted the date of the action of the League on this matter as the date of termination, instead of fixing a calendar date or a definite number of years of duration.

<sup>1</sup> Cf. the Senate debate on the reservation to the German peace treaty relating to withdrawal of the United States from the League of Nations. Cong. Record November 8, 1919, vol. 58, pp. 8599 ff.

<sup>2</sup> Cong. Record, Sept. 22, 1919, vol. 58, pp. 6044-5.

## TERMINATION ON CONGRESSIONAL AUTHORIZATION

On several occasions Congress, by act or joint resolution, has assumed to authorize the President to give notice of the termination of a treaty whose terms provided that it might be terminated on giving a specified notice. Thus by a joint resolution of April 27, 1846, Congress undertook to "authorize" the President, "at his discretion," to give the British Government notice of the termination of the convention of 1827 concerning the joint occupation of the Northwest territory.<sup>1</sup> Such action on the part of Congress had been recommended by President Polk in his first annual message.<sup>2</sup> In his annual message of 1854 President Pierce informed Congress that he deemed it expedient that notice be given to the Government of Denmark of the intention of our Government to terminate the Danish treaty of 1826, in accordance with its terms.<sup>3</sup> A few months later the Senate unanimously adopted, in executive session, a simple resolution "authorizing" the President "at his discretion" to give the contemplated notice; and the notice was shortly afterwards given.<sup>4</sup> This case differed from the one previously mentioned in that legislative authorization was given through a Senate resolution merely, and not through a joint resolution. The legality of the action taken was upheld in a report of the Senate Committee on Foreign Relations.<sup>5</sup> A joint resolution approved January 18, 1865, stipulated that notice be given of the termination of the Canadian reciprocity treaty of 1854 with Great Britain, in accordance with its provisions, and the President was charged with the communication of such notice to the

<sup>1</sup> 9 Stat. at L., 109; Malloy, *Treaties*, etc., 644.

<sup>2</sup> Richardson, *Mess. and Pap. of the Presidents*, IV, 395.

<sup>3</sup> Richardson, *op. cit.*, V, 279.

<sup>4</sup> Richardson, *op. cit.*, V, 334; Reports of Senate Committee on For. Rels., Sen. doc. 231, 56th Cong., 2d sess., VIII, 107-8; *Bartram v. Robertson*, 122 U. S., 116; *Sen. Exec. Journal*, IX, 431.

<sup>5</sup> Sen. doc. 231, *loc. cit.* See also *ibid.*, VIII, p. 66; Sen. rept. 195, 34th Cong., 1st sess., Sen. rept. 97, 34th Cong., 1st sess., reprinted in *Cong. Record*, vol. 58, Nov. 8, 1919, p. 8126.



British Government.<sup>1</sup> Legislative authorization, it should be observed, can be given by act as well as by joint resolution. Thus in the Seamen's Act of 1915 Congress "requested and directed" the President to give notice of the termination of certain treaty provisions in conflict with the measure.<sup>2</sup>

The question may be raised as to the extent of the binding force of such legislative provisions. Is the President bound to give notice of termination when directed by Congress to do so? Practical considerations connected with the expediency of maintaining harmonious relations between the executive and legislative branches, as well as between our Government and other governments, may require the President to give the specified notice. Where the President is unable to enforce a treaty as law of the land without the coöperation of Congress, and Congress not only does not coöperate, but passes legislation in conflict with the treaty, the President is practically bound in the international sense, and legally bound in the municipal sense, to consider the treaty terminated and to notify the foreign governments accordingly. Thus in the case of the Seamen's Act of 1915 the President was placed under practical compulsion to give the required notices, and under legal compulsion to consider the treaty provisions in question terminated as law of the land, since the act contained provisions conflicting with the treaty stipulations. If the notices had not been given, the conflicting treaty stipulations would have been abrogated as law of the land by unilateral legislative act on our part without notice to the other contracting parties, who would then have had just ground for complaint against us.

On account of the special power of Congress over the

<sup>1</sup> 13 Stat. at L., 566. U. S. Tariff Commission: *Reciprocity and Commercial Treaties* (1919), pp. 23, 74. Cf. a similar instance of the termination of the Belgian treaty of 1858, 18 Stat. at L., 287; *For. Rel. of U. S.*, 1874, p. 64, and cf. resolution for termination of Hawaiian reciprocity treaty, Senate doc. 206, 57th Cong., 2d sess., p. 8.

<sup>2</sup> 38 Stat. at L., pt. 1, p. 1184.

regulation of commerce and custom duties, this general situation is especially likely to arise in connection with the termination of commercial agreements. In 1909 Congress provided in the Payne-Aldrich tariff act that the President should "have power" and that it should be "his duty" to notify the foreign governments with which we had commercial agreements, authorized by the Dingley tariff act of 1897, of the termination of such agreements in conformity with their terms.<sup>1</sup> After the act was passed the Secretary of State, who had already sent out preliminary notices, definitively notified a number of foreign governments of the intention of our Government to terminate these agreements;<sup>2</sup> and when the French Government protested, the acting Secretary of State replied: "As you are aware, the President of the United States, in giving the formal notices on August 7, 1909, has been obliged to follow implicitly the prescriptions of the new tariff act of the United States."<sup>3</sup>

Although the President may thus be practically compelled to give the specified notice, from the legal point of view the situation is somewhat different. Even if Congress should enact a law directing the President to give notice of the termination of a treaty, and should pass it over his veto by a two-thirds vote, there would be no means of legally forcing the execution of the mandate—at all events, none short of impeachment. If, indeed, the President could be legally compelled to execute such a mandate, he would sink into the position of a mere ministerial agent of Congress, without discretion in conducting this phase of our foreign relations. It can hardly have been the intention of the framers of the Constitution that he should occupy such a position. This, of course, is not equivalent to either affirming or denying that the President could, in every case, act on his own initiative in terminating a treaty by notice to that effect in

<sup>1</sup> 36 Stat. at L., pt. 1, p. 83; Malloy, *op. cit.*, 542.

<sup>2</sup> *For. Rels. of U. S.*, 1909, pp. 46, 248, 270, 288, 389, etc., U. S. Tariff Commission, *Reciprocity and Commercial Treaties*, pp. 31, 227-8.

<sup>3</sup> *For. Rels. of U. S.*, 1909, p. 251.

accordance with its terms, without waiting for legislative authorization.

Congress has sometimes undertaken not only to direct the President to give notice of the termination of a treaty but also to specify the time within which, or the date on which, the notice shall be given. Thus in the Seamen's Act already referred to the President was directed to give the specified notice within ninety days after the passage of the act, while by the tariff act of 1909 he was directed to give the required notices to foreign governments within ten days after the passage of the act. In a joint resolution of March 3, 1883, Congress, after declaring that certain sections of the treaty of 1871 between the United States and Great Britain ought to be terminated at the earliest possible time, directed the President to communicate the proper notice to the British Government on the first day of July following, or as soon thereafter as might be.<sup>1</sup> The first day of July of that year fell on Sunday, and the notice was officially communicated on the following day.<sup>2</sup> As a matter of comity, the President may thus comply with the directions of Congress as to the time of giving notice. But if he cannot legally be compelled to give notice at all, it follows that he cannot legally be forced to give it at or within any specified time. Unless he acts promptly, Congress may withdraw the authorization. But if the authorization was not essential in the first place withdrawal of it would be without legal effect.

This question of the power of Congress to compel the President to terminate treaties was brought up prominently by the action of President Wilson in making public his intention not to comply with the provision of section 34 of the Merchant Marine Act of June 5, 1920, which "authorized and directed" him "within ninety days after this act becomes law to give notice to the several governments, respectively parties to such treaties or conventions, that so

<sup>1</sup> 22 Stat. at L., 641.

<sup>2</sup> *For. Rels. of U. S.*, 1883, pp. 414, 441.

much thereof as imposes any restriction on the United States (as to discriminatory custom duties and tonnage dues) will terminate on the expiration of such periods as may be required for the giving of such notice by the provisions of such treaties or conventions.”<sup>1</sup> It has been argued that the President could have been compelled by Congress to give the notice of termination specified by this act by virtue of its power to regulate foreign commerce and to pass all laws necessary and proper to carry into execution its other legislative powers and all other powers of the Government.<sup>2</sup> If, however, this view is correct, it would be equally true that, in the exercise of such powers, Congress could compel the President and Senate to make treaties which it should consider necessary and proper for the regulation of foreign commerce. But it will hardly be contended that Congress can do this. Congress could, of course, terminate the treaties as law of the land by passing conflicting legislation which the President would be bound to enforce; but the international validity of the treaties would not be thereby affected. The notices which, in the act of 1920, Congress directed should be given did not provide for the termination of the treaties in their entirety, but only of such portions as laid the United States under an obligation not to impose discriminatory duties. As the treaties were reciprocal in character, it would hardly be supposed that the foreign nations concerned would be willing to allow the United States to relieve itself of its obligations under them without availing themselves of a similar privilege. The action of Congress was aimed, however, as far as the express provisions went, only at the partial termination of the treaties. But the notices were not given as required in the act.

When Congress attempted in 1879 to secure the partial abrogation of a treaty with China, President Hayes, in veto-

<sup>1</sup>41 U. S. Stat. at L., 1007; *New York Times*, September 25, 1920.

<sup>2</sup>*Weekly Review*, October 6, 1920, p. 282.

ing the bill, said: "As the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an amendment of a treaty a competent exercise of authority under the Constitution. The importance, however, of this special consideration seems superseded by the principle that a denunciation of a part of a treaty not made by the terms of the treaty itself separable from the rest is a denunciation of the whole treaty."<sup>1</sup>

#### TREATIES CONTAINING NO PROVISION FOR TERMINATION

We have been considering treaties which contain provisions for their own termination, as most treaties now do. The United States has, however, at times entered into treaties which, lacking any provision of this kind, were, on their face, permanent, or even perpetual. Of this character was the Clayton-Bulwer Treaty of 1850 with Great Britain concerning a trans-isthmian canal. About thirty years after this treaty was made, however, the United States became dissatisfied. Secretary Blaine characterized the instrument as a compact "misunderstandingly entered into, imperfectly comprehended, contradictorily interpreted, and mutually vexatious,"<sup>2</sup> and argued plausibly that, in view of the remarkable development of the United States on the Pacific Coast, together with other changes that had taken place, the treaty, on the principle of *rebus sic stantibus*, should be modified, if not considered terminated.<sup>3</sup> This view was not accepted by the British Government, but the

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, VII, 519.

<sup>2</sup> *For. Rel. of U. S.*, 1881, p. 568. Cf. Report of the House Committee on Foreign Affairs on a House resolution requesting the President to abrogate the Clayton-Bulwer Treaty. House rept. 1121, 46th Cong., 2d sess. (1880), and Bigelow, *Breaches of Anglo-American Treaties*, Chaps. IV and V.

<sup>3</sup> *Ibid.*, 554-9; Henderson, *American Diplomatic Questions*, 144 ff.

agitation continued, and in 1891 the Senate Committee on Foreign Relations unanimously declared that, in its opinion, the convention of 1850 had become obsolete.<sup>1</sup> After the Spanish-American War some hotheads in the lower house of Congress were in favor of abrogating or repealing the treaty outright. Wiser men in the administration and in the Senate recognized, however, that the honorable method of securing release from a treaty which is on its face perpetual is to make a new treaty superseding it. Resolutions were accordingly introduced in the Senate requesting the President to open negotiations with Great Britain looking to the modification or abrogation of the objectionable compact.<sup>2</sup> The negotiations were instituted, and in 1901 the Hay-Pauncefote Treaty, as has been indicated, superseded, in express terms, the earlier agreement.<sup>3</sup>

#### CONGRESSIONAL TERMINATION OF TREATIES AS LAW OF THE LAND

When, as in the case just mentioned, a treaty provides no method for its own termination, but is on its face perpetual, the President cannot, by his sole act, terminate it either as an international compact or as a law of the land. It can be terminated absolutely, *i.e.*, both internationally and municipally, only by the making of a new treaty superseding the earlier one;<sup>4</sup> although it may be terminated in its aspect merely as law of the land by an act of Congress. Such an act may provide expressly for the abrogation of the treaty as law of the land, or it may abrogate it indirectly, *e.g.*, through necessary implication of conflicting

<sup>1</sup> Sen. rept. 1944, 51st Cong., 2d sess., pp. 4-5.

<sup>2</sup> Cong. Record, December 8, 1898, vol. 32, p. 55; *ibid.*, December 13, 1900, vol. 34, p. 265.

<sup>3</sup> See *History of Amendments Proposed to the Clayton-Bulwer Treaty*, Senate doc. 746, 61st Cong., 3rd sess., 1911; *Diplomatic History of the Panama Canal*, Senate doc. 474, 63rd Cong., 2d sess., 1914; also Senate doc. 456, 63rd Cong., 2d sess.

<sup>4</sup> Except that, in some cases, it can be terminated in both aspects by a Congressional declaration of war.

or inconsistent legislation. The only instance of express abrogation occurred in 1798, when, after declaring that the treaties of 1778 between the United States and France had been repeatedly violated by the French Government, and that, in spite of our remonstrance, that Government continued to pursue against the United States "a system of predatory violence, infracting the said treaties and hostile to the rights of a free and independent nation," Congress enacted that the United States "are of right freed and exonerated from the stipulations" of such treaties, and that "the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States."<sup>1</sup>

By basing the termination of the treaties on the adverse breach by France and declaring them no longer obligatory on the Government of the United States, the language of this act gave evidence of the intention of Congress to terminate the treaties, not only as law of the land, but also as international compacts. That such was the effect of the act was held by the Court of Claims of the United States, which declared that "a treaty which on its face is of indefinite duration and which contains no clause providing for its termination may be annulled by one of the parties under certain circumstances. As between the nations it is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party, the other may, at its option, declare it terminated. . . . We are of opinion that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute but as between the nations; and that thereafter the compacts were ended."<sup>2</sup> The contention that the act of Congress was a valid international abrogation of the treaties was not, however, ac-

<sup>1</sup> 1 Stat. at L., 578; Moore, *Digest of Internat. Law*, V, 356; J. B. Scott [ed.], *The Controversy over Neutral Rights between the United States and France, 1797-1800*, 65.

<sup>2</sup> *Hooper v. United States*, 22 C. Cls., 408; J. B. Scott [ed.], *The Controversy over Neutral Rights between the United States and France, 1797-1800*, 350-405.

quiesced in by the French Government, and two years afterwards that Government's position in the matter was apparently to some extent recognized as just by the United States.<sup>1</sup>

In this case Congress assumed to decide that the adverse breach was sufficient cause for considering the treaties terminated. The act in question, however, together with other measures passed about the same time, may be considered as having constituted a declaration of partial war or limited hostilities;<sup>2</sup> and the treaties may be regarded as having been terminated on account of the declaration and existence of such a state of hostilities.<sup>3</sup>

#### TERMINATION BY ADVERSE BREACH

That Congress has at least a qualified right to pronounce a treaty terminated on account of adverse breach was apparently recognized by President Grant in 1876, when, in a message to Congress, he declared that the action of Great Britain in requiring the agreement of the United States to conditions<sup>4</sup> not provided for in the extradition article of the Webster-Ashburton Treaty of 1842 before surrendering fugitives from justice, "if adhered to, cannot but be regarded as the abrogation and annulment of the article of the treaty on extradition." Continuing, he said: "It is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land." But he then added: "Should the attitude of the British

<sup>1</sup> Moore, *Digest of Internat. Law*, V, 357-8.

<sup>2</sup> *Bas v. Tingy*, 4 Dall., 37; *Talbot v. Seeman*, 1 Cranch, 1, reprinted in J. B. Scott [ed.], *The Controversy over Neutral Rights between the United States and France, 1797-1800*, 104-152.

<sup>3</sup> Cf. Corwin, *National Supremacy*, 79.

<sup>4</sup> *Viz.*, that the United States agree that persons extradited from Great Britain should not be tried in the United States for offenses other than those for which extradition had been demanded.



Government remain unchanged, I shall not, without an expression of the wish of Congress that I should do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the treaty of 1842.”<sup>1</sup> Thus, while asserting that it is for Congress to determine whether a treaty provision is still binding on our Government, the President, in the next breath, assumes that, in the absence of any pronouncement by Congress on the matter, he has the right to consider the treaty provision terminated by declining to enforce it.<sup>2</sup>

In other cases the Executive has assumed to exercise a concurrent, if not an exclusive, power to decide that events happening outside of our jurisdiction have had the effect of terminating treaties to which we were a party. Thus in 1815 Monroe, while Secretary of State, notified the Dutch minister that treaties between the United States and some of the European powers, including the treaty of 1782 with the Netherlands, had been annulled “by causes proceeding from the state of Europe for some time past.”<sup>3</sup>

When a foreign government with which the United States has a treaty notifies our Government of the termination of the treaty in accordance with its provisions, or when a third power absorbs a country with which the United States has treaties and notifies our Government of the termination of such treaties by virtue of that fact, such notification of termination is received and acquiesced in by the Executive, and no action by the legislative department is necessary to effectuate the termination. Thus in 1897 the Secretary of State accepted on behalf of our Government the denunciation of a treaty by the Dominican Republic and declared

<sup>1</sup> Richardson, *op. cit.*, VII, 372-3, 414-6; *For. Rels. of the U. S.*, 1876, 204-309; Moore, *Digest of Internat. Law*, V, 321-2. The operation of the treaty was suspended for six months and then revived. For the diplomatic correspondence in the case, see House Exec. Doc. 173, 44th Cong., 1st sess. (1876).

<sup>2</sup> It should be remembered, however, that the treaty provision in question was susceptible of termination upon notice.

<sup>3</sup> *For. Rels. of the U. S.*, 1873, II, pp. 715-6, 720-7; Moore, *Digest of Internat. Law*, V, 344-5.

the treaty terminated by virtue of that act.<sup>1</sup> Again, when Madagascar was definitely absorbed by France in 1896 our State Department, on being notified of the fact of the establishment of French control in the island, recognized the termination of our consular treaty with Madagascar by instructing our consuls there to discontinue the operations of American consular courts provided for by the now obsolete treaty.<sup>2</sup> That the executive department is competent to decide whether the breach of a treaty by the other contracting party is sufficient to terminate it was indicated by the Supreme Court in the Charlton extradition case, when it said: "The Executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant."<sup>3</sup>

#### THE COURTS AND POLITICAL QUESTIONS

As indicated in the decision just cited, the courts follow the determinations of the political departments of the Government when passing upon the question whether a treaty has been terminated by adverse breach or other cause or is still in force. In the Charlton case the political department whose determination was held binding on the court was the executive. But in other cases the courts have similarly followed the legislature for the very good reason that this authority determines the law of the land, within the limits of the Constitution, even to the extent of abrogating treaties. As the lower court remarked in the Charlton

<sup>1</sup> *For. Rel. of U. S.*, 1897, p. 126.

<sup>2</sup> *Ibid.*, 1896, pp. 123-4. Cf. *Mahoney v. U. S.*, 10 Wall., 62, where the court recognized that our treaty of 1816 with Algiers expired when that country was absorbed by France in 1830. The court followed the construction placed by the State Department upon the act of Congress of 1810 allowing salaries to consuls in certain countries, based impliedly on the assumption of the termination of the treaty of 1830 as sanctioned by later acts of Congress. Our treaty with Hanover was abrogated through its annexation by Prussia in 1867. *For. Rel. of U. S.*, 1875, p. 479.

<sup>3</sup> *Charlton v. Kelly*, 229 U. S., 447.

case, the option of considering the treaty terminated must be exercised by the "political departments—Congress or the treaty-making power—possibly the executive power within certain limitations; assuredly not the judiciary."<sup>1</sup>

Public rights accruing to the United States under the terms of a treaty may be renounced and terminated by the action of the political departments of the Government. Thus in his message of December 3, 1907, President Roosevelt asked authority of Congress to remit a portion of the Chinese indemnity accruing to the United States under the convention between the powers and China made at the conclusion of the Boxer troubles in 1900; and authority to do so was granted by a joint resolution of May 25, 1908, with the proviso that a certain sum should be reserved for the payment of private claims to be adjudicated by the Court of Claims.<sup>2</sup>

Although the question of the continuing obligation of a treaty is a political one, the courts hold that private rights which have been established by treaty survive, even though the treaty is terminated through the action of the political departments of the Government. Thus the Supreme Court held that titles to land in the United States acquired by French subjects under sanction of the treaty of 1778 were not divested by the abrogation of that treaty, or by the expiration of the convention of 1800.<sup>3</sup> The same court held also that the War of 1812 did not set aside the treaty of 1794 between the United States and Great Britain to the extent of depriving the British Society for the Propagation of the Gospel of property rights vesting under such treaty.<sup>4</sup> The

<sup>1</sup> *Ex parte Charlton*, 185 Fed., 880, cited by Crandall, *Treaty-Making Power*, 464. Cf. *Terlinden v. Ames*, 184 U. S., 270; *Mahoney v. U. S.*, 10 Wall., 62; *Hooper v. U. S.*, 22 C. Cls., 408.

<sup>2</sup> 35 Stat. at L., pt. 1, p. 577; *Malloy, op. cit.*, 2008; *Am. Journal of Internat. Law*, III, 451-7. A part of the sum thus remitted has been used to defray the expenses of Chinese students at American universities.

<sup>3</sup> *Carneal v. Banks*, 10 Wheat., 181, as summarized in *Moore, Digest of Internat. Law*, V, 373.

<sup>4</sup> *Society, etc., v. New Haven*, 8 Wheat., 464; *Moore, Digest of Internat. Law*, V, 372.

kind of private rights which thus continue despite the termination or suspension of a treaty has been further elucidated by the Supreme Court in the Chinese exclusion case as follows: "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character." <sup>1</sup>

Where judicial action is necessary for enforcement, the Supreme Court might virtually terminate a treaty as law of the land by declaring it unconstitutional. This, however, has never been done, and probably would not be done except in a clear case of conflict between a treaty and the Constitution.

#### CONGRESSIONAL TERMINATION THROUGH CONFLICTING LEGISLATION

As previously indicated, Congress may terminate a treaty, at least in its character as a law of the land, not only by enacting a law expressly abrogating it, as was done in 1798, but also by enacting a law conflicting with, or inconsistent with, provisions of a prior treaty. When the act of Congress is constitutionally determinative of our governmental policy toward a foreign nation, and when a step by our Government is recognized in international law as having this effect, the act may terminate a treaty in its character of an international compact, as well as in that of law of the land. Thus an act or joint resolution of Congress declaring a state of war to exist with a foreign country has the effect of terminating, or at least suspending, certain kinds of treaty arrangements between the United States and that country. As Justice Curtis said on circuit, the Constitution "gives to Congress, in so many words, power to declare war, an act which, *ipso facto*, repeals all treaties

<sup>1</sup> 130 U. S., 581, 609, cited in Moore, *Digest of Internat. Law*, V, 372.

inconsistent with a state of war.”<sup>1</sup> And the Supreme Court, speaking through Justice Miller in the *Head Money Cases*, declared that “a declaration of war, which must be made by Congress, . . . when made, usually suspends or destroys existing treaties between the nations thus at war.”<sup>2</sup> The question as to what treaties are inconsistent with a state of war and are terminated or suspended by the outbreak of war, and what treaties remain in force, is to some extent unsettled in international law and need not be considered here.<sup>3</sup> As already indicated, the question of the effect of war upon particular treaty stipulations where private rights are involved has been before the courts of the United States for adjudication. The matter has also been the subject of diplomatic representations. Thus the State Department took the ground in 1898 that not all treaties between the United States and Spain were abrogated by the war, as was held by the Spanish Government, but that those treaty provisions which were made with reference to a state of war and were expressly applicable thereto found therein their full force and effect.<sup>4</sup> Our Government recognized, however, that the copyright agreement of 1895 between the two countries was suspended by the outbreak of war, although it was revived, upon the proclamation of peace, without express renewal.<sup>5</sup>

The power of declaring treaties terminated on account of hostilities against the United States has been, with reference to Indian treaties, conferred by Congress upon the

<sup>1</sup> 2 Curtiss, C. C. Rep. 454.

<sup>2</sup> 112 U. S., 580.

<sup>3</sup> See G. B. Davis, “The Effects of War upon International Conventions and Private Contracts,” *Proceedings of Am. Soc. of Internat. Law*, 1912, pp. 124-132.

<sup>4</sup> *For. Rel. of U. S.*, 1898, pp. 774, 972; Moore, *Digest of Internat. Law*, V, 376.

<sup>5</sup> Crandall, *Treaty-Making*, 451. The treaty of 1831 with Mexico was suspended by the war of 1846 with that country. The British Government urged that the rights acquired by the United States under the treaty of 1783 were abrogated by the War of 1812 and did not revive automatically by a renewal of peace. The United States denied this; although the right of British subjects to navigate the Mississippi, under terms of the treaty of 1783, was not thereafter recognized.

President. "In cases where the tribal organization of any Indian tribe," says an act of July 5, 1862, "shall be in actual hostility to the United States, the President is hereby authorized by proclamation to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations."<sup>1</sup>

Not only by an act or joint resolution declaring war, but by any legislation (if otherwise constitutional) conflicting with or inconsistent with the provisions of a prior treaty, Congress can abrogate a treaty in its character as law of the land, to the extent, at least, of such conflict. As early as 1851 Attorney-General Crittenden held that "an act of Congress is as much a supreme law of the land as a treaty. They are placed on the same footing, and no preference or superiority is given to the one or the other. The last expression of the law-giving power must prevail and have effect, though inconsistent with a prior act; so must an act of Congress have effect, though inconsistent with a prior treaty."<sup>2</sup> The rule thus laid down has become the settled doctrine of the courts. Thus, as the Supreme Court declared in the Head Money Cases, "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."<sup>3</sup>

The treaty provisions which are most likely to be repealed as law of the land by subsequent conflicting legislation, and

<sup>1</sup> 12 Stat. at L., 528; R. S., sect. 2080.

<sup>2</sup> 5 Op. U. S. Atty.-General, 345. See also 6 *ibid.*, 291; 13 *ibid.*, 357 and report of the House Committee on Education and Labor on the bill passed in 1879 to restrict Chinese immigration, Cong. Record, January 18, 1879, vol. 8, p. 793.

<sup>3</sup> 112 U. S., 580. See also *Taylor v. Morton*, 2 Curtis, C. C. Rep., 454; *The Cherokee Tobacco*, 11 Wall., 616; *Chae Chan Ping v. U. S.*, 130 U. S., 581; *Fong Yue Ting v. U. S.*, 149 U. S., 698; *U. S. v. Lee Yen Tai*, 185 U. S., 213; *La Abra Silver Mining Co. v. U. S.*, 175 U. S., 423; *Botiller v. Dominguez*, 130 U. S., 238. For a collection of cases on this point, with quotations from them, see *Extracts from Briefs on the Power of Congress over Treaties*, Senate doc. 487, 60th Cong., 1st sess. (1908).

capable of being so adjudicated by the courts, are those which undertake presently to establish rights of aliens in connection with entrance into and residence in the United States. Such provisions do not necessarily require auxiliary legislation for their enforcement; in the absence of conflicting legislation, they become binding on the courts in their quality as primary law of the land. When, however, alien rights are merely promised and not presently established by treaty, and it is necessary that Congressional legislation be enacted before the treaty can be enforced, it follows that Congress may practically abrogate the treaty by failure to pass the enforcement legislation, especially if the instrument specifies a time limit within which such legislation shall be passed. The effect in such a case is, to all intents and purposes, the same as the enactment by Congress of legislation conflicting with a self-executing treaty.<sup>1</sup>

One of the most conspicuous examples of abrogation of a treaty provision as law of the land was the annulment of the Chinese treaty of 1868 (known as the Burlingame Treaty) and the supplementary treaty of 1880. In 1879 Congress passed a bill which placed restrictions on Chinese immigration into the United States and instructed the President to abrogate certain articles of the Burlingame Treaty relating to that subject. President Hayes vetoed the measure, saying: "The authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is as free from controversy under our Constitution as is the further proposition that the power of making new treaties or modifying existing treaties is not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate, as shown by the concurrence of two-thirds of that body. . . .

<sup>1</sup>Such practical abrogation through failure to pass enforcement legislation occurred in the case of the Mexican reciprocity treaty of 1883. Congress might practically nullify a treaty providing for an international commission, such as a boundary commission, by failing to appropriate funds to pay the salaries and expenses of our commissioners.

As the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an amendment of a treaty a competent exercise of authority under the Constitution."<sup>1</sup>

In the following year a supplementary treaty with China authorized the United States to regulate, limit, or suspend the coming of Chinese laborers into the country, or their residence therein, but not absolutely to prohibit such immigration and residence.<sup>2</sup> In 1888, however, Congress passed an act making it unlawful for any Chinese laborers who had once lived in this country and had departed from it to return to it or remain in it.<sup>3</sup> The Supreme Court held that this act was in contravention of express stipulations of the treaties of 1868 and 1880, but said: "It is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of Congress. . . . A treaty is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."<sup>4</sup> The invalidation of a prior treaty by an act of Congress may give a foreign government a just ground of complaint. But such complaint, the court said, "must be made to the political department of our Government, which

<sup>1</sup> Richardson, *op. cit.*, VII, 518-9. Cf. the veto by President Arthur of the bill of 1882, which he termed a breach of our international faith, because in violation of the treaty of 1880. *Ibid.*, VIII, 112.

<sup>2</sup> Malloy, *op. cit.*, 238.

<sup>3</sup> 25 Stat. at L., 504.

<sup>4</sup> *Chae Chan Ping v. U. S.*, 130 U. S., 581.



is alone competent to act upon the subject. . . . The question whether our Government is justified in disregarding its engagements with another nation is not one for the determination of the courts."<sup>1</sup>

#### TERMINATION THROUGH LEGISLATIVE IMPLICATION

The termination of a treaty may be brought about indirectly by an act of Congress, not through a conflict between such act and express stipulations of the treaty, as in the Chinese exclusion case, but through a general inconsistency between the two instruments. Thus the act of Congress admitting Wyoming as a state was held by the Supreme Court to supersede, by necessary implication, a treaty with the Bannock Indians giving them certain hunting privileges in territory included in the new state.<sup>2</sup> The doctrine of abrogation by implication, however, is not held in much favor, and the intention to abrogate must plainly appear.<sup>3</sup>

It must be remembered, of course, that conflicting acts of Congress terminate a treaty merely as law of the land and have no effect upon its international validity. It must also be borne in mind that an infraction of a treaty does not necessarily constitute a termination of it, although an adverse breach may give the other contracting party just ground for considering the treaty at an end. As the Su-

<sup>1</sup> *Chae Chan Ping v. U. S.*, 130 U. S., 581. In order to bring treaty stipulations more nearly in harmony with the law of the land, a treaty was concluded in 1894 which prohibited, with certain conditional exceptions, the coming of Chinese laborers to the United States for a period of ten years. Malloy, *op. cit.*, 242. Cf. an opinion that the denouncement of the treaty of 1894 opens the United States to unrestricted Chinese immigration (Sen. doc. 242, 58th Cong., 2d sess.); and see "Treaty, Laws and Rules Governing the Admission of Chinese" (Bureau of Immigration, Dept. of Labor, 1914); also Sen. Exec. doc. 54, 52d Cong., 2d sess., and "Exclusion of Chinese Laborers," Sen. doc. 162, 57th Cong., 1st sess.; also Sen. doc. 449, 59th Cong., 1st sess.; House doc. 847, 59th Cong., 1st sess.; House rept. 1231, 57th Cong., 1st sess.

<sup>2</sup> *Ward v. Race Horse*, 163 U. S., 504, cited in Butler, *Treaty Making Power*, II, 132-5.

<sup>3</sup> *In re Chin A. On*, 18 Fed., 506, cited in Moore, *Digest of Internat. Law*, V, 359.

preme Court said in the Charlton extradition case, a treaty is not abrogated by a violation of it by one of the parties, unless the political authorities of the other party choose to regard it as no longer in force.<sup>1</sup> In other words, the treaty is not void, but voidable. In passing acts which may be found to run counter to treaty provisions, Congress sometimes endeavors to fend off the charge of international bad faith by specifically stipulating that such treaty provisions shall not be considered as thereby terminated. Thus in the tariff act of 1913 Congress undertook to allow a five per cent discount to merchandise imported in American vessels, but with the proviso that "nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."<sup>2</sup> The Supreme Court held that the discount thus allowed would be inoperative as long as existing reciprocity treaties with foreign countries should remain in force.<sup>3</sup>

#### TERMINATION OF TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY

We have been considering hitherto the termination of treaties to which the United States is a contracting party. When, however, one of the parties to a treaty is absorbed by the United States, treaties to which the United States is not itself a party may be terminated through the action of our Government. Thus when the Hawaiian Islands ceased to exist as an independent state through annexation to the United States, the treaties to which the Islands were a party, whether made with the United States or with other nations, were terminated. The joint resolution of Congress providing for the annexation of the Islands declared that "the existing treaties of the Hawaiian Islands with foreign

<sup>1</sup> 229 U. S., 447.

<sup>2</sup> 38 Stat. at L., 196, Chap. 16, sect. IV, J., subsect. 7.

<sup>3</sup> United States v. Pulaski Co., 243 U. S., 97.

nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations.”<sup>1</sup> Likewise, the treaties of Texas with foreign nations were, upon the annexation of that republic to the United States, terminated, in so far as they were inconsistent with the public law of this country.<sup>2</sup> The acquisition of the Sulu Islands in 1898 also brought to an end certain treaties in which Spain had granted to European powers commercial privileges in the archipelago.<sup>3</sup>

### CONCLUSIONS

In view of the foregoing facts and considerations, it will be perceived that the question as to what organ of the Government is competent to terminate a treaty is not susceptible of a definite answer until the nature of the particular treaty and the surrounding circumstances are considered. It is necessary to distinguish between treaties which provide for their own termination and those that do not, and between treaties in their character as law of the land and in that as international compact. Some treaties are self-executing without further legislation, while others require auxiliary legislation before they can be enforced by the courts as law of the land. Some, such as treaties of alliance, contemplate governmental action by the political departments and are not susceptible of enforcement by the courts. These are some of the facts which must be considered in any answer to the question of what organ of the Government is competent to terminate treaties to which the United States is a party.

It has been declared that “all in all, it appears that legislative precedent, which moreover is generally supported by the attitude of the Executive, sanctions the prop-

<sup>1</sup> 30 Stat. at L., 750; Moore, *Digest of Internat. Law*, V, 350.

<sup>2</sup> Crandall, *op. cit.*, 433-4.

<sup>3</sup> C. E. Magoon, *Reports on the Law of Civil Government*, etc., 302, 316.

osition that the power of terminating the international compacts to which the United States is party belongs, as a prerogative of sovereignty, to Congress alone."<sup>1</sup> It cannot be maintained, however, that law and practice bear out such a sweeping statement. Some treaties may be more appropriately terminated by the President than by Congress, and *vice versa*; some may be terminated with equal effectiveness by the action of the President, or of the treaty-making body, or of Congress. Sometimes more than one method may with propriety be pursued in accomplishing the same object; although usually one method is more appropriate, that is, more in accordance with law and practice, than the others.

Without question, a mere executive agreement, which is not a full-fledged treaty, may be terminated, in so far as it is susceptible of termination at all, by the President alone, without the concurrence or approval of any other branch or organ of the Government. This is especially obvious in cases where no legislative act or treaty provision has authorized the making of the agreement, and no enforcement legislation has been passed:

Any full-fledged treaty may, of course, be superseded through a new exercise of the treaty-making power of the President and the Senate, joined with the consent of the opposite contracting party. Where a treaty provides for its own termination upon the giving of notice, such consent is given in advance for its termination upon a given contingency and without reopening negotiations. A treaty is created by the will of the treaty-making power, and if it contains a reservation by which that will may be revoked or its exercise be made to cease on a stipulated notice, it follows that the revocation is incident to the will, and that the treaty may be terminated by the President and the Senate.<sup>2</sup> But the further question arises whether, under

<sup>1</sup> Corwin, *The President's Control of Foreign Relations*, 115.

<sup>2</sup> Cf. Reports of the Senate Committee on Foreign Relations (Sen. doc. 231, 56th Cong., 2d sess., VIII, 111).

these circumstances, the President may give notice of termination without the concurrence of either the Senate or Congress. As is pointed out in a previous chapter, the President may be considered the final authority in treaty-making, since, even after the Senate has given its advice and consent to the ratification of a proposed treaty, he—through his power of ratifying the instrument and exchanging ratifications or failing to do so—has the option of deciding whether or not the project shall become a real treaty. It has also been shown that the President, acting on his own authority or under the authorization of the treaty-making body, may make certain kinds of executive agreements. It may therefore be argued by analogy that since the Senate has already, in its treaty-making capacity, acted upon a treaty providing for its termination upon notice, no further Senatorial action is necessary in effecting such termination, and that the President alone, as the mouthpiece of the nation in its international relations, may denounce the treaty by giving notice of its termination. This theory is supported by the action of the Executive during the Civil War in giving notice of the termination of the Rush-Bagot convention and in withdrawing such notice, in both cases prior to Senatorial or Congressional authorization, and, more recently, by the course of President Taft in 1911 in claiming and exercising the right to abrogate, by due notice, the Russian treaty prior to any action by the Senate or by the houses of Congress jointly. The theory receives still stronger support from the action of Secretary Hay in 1899 in notifying the Swiss Government of the termination of certain articles of the treaty of 1850 without prior authorization or subsequent ratification by Congress or by either branch thereof.

It is true that Congress assumed to “authorize” President Polk “at his discretion” to terminate by notice the British Convention of 1827 and that the President had requested such authorization, and it has been asserted that

this "episode clearly supports the theory that international conventions to which the United States is party must be terminated by act of Congress."<sup>1</sup> But it just as clearly does not establish such a theory, for, as was pointed out in a report of the Senate Committee on Foreign Relations in 1856, "the assent of both houses of Congress was certainly calculated to make the act more impressive upon England than if authorized by the Senate alone, especially as it was known that on the policy of giving the notice at all the Senate was by no means united. . . . Whilst, therefore, the committee are clear in the opinion that the right to give the notice in question pertains to the treaty-making power, they see nothing in the fact that, in the case with England, the House of Representatives acted with it, from which it is necessarily to be inferred that such union was then considered necessary to perfect the authority. But if it were so intended, the committee would not yield to the precedent."<sup>2</sup> It may also be recalled that while President Grant submitted to Congress the question of terminating the extradition article of the Webster-Ashburton Treaty, he also claimed a concurrent power of considering the article as having lapsed without Congressional action.

Congress or the Senate may, on its own initiative, take prior action in "authorizing" the President "at his discretion" to denounce a treaty by giving notice of its termination, just as Congress or the Senate may "authorize" or request the President to negotiate a treaty, or as the Senate may consent to the ratification of a treaty already negotiated. But in all of these cases the President need not heed the request nor act on the so-called authority granted. Such action on the part of Congress or the Senate has no international validity until ratified by the President; so that, just as the President is the final authority in treaty-making, through his power of ratifying a treaty and exchanging ratifications, so is he, in general, the final

<sup>1</sup> Corwin, *op. cit.*, 112.

<sup>2</sup> Sen. doc. 231, 56th Cong., 2d sess., VIII, 111-112.

authority in the matter of denouncing a treaty, through his option of giving or withholding notice of termination and of withdrawing such notice within the time limit when given. As a matter of comity, however, and in the interest of harmonious relations between the political departments of the Government, he undoubtedly will, in most cases, endeavor to secure the formal approval of his action by Congress, or at least by the Senate. "Though the Senate participates in the ratification of treaties," says a leading writer on the constitutional law of the United States, "the President has the authority, without asking for Senatorial advice and consent, to denounce an existing treaty and to declare it no longer binding upon the United States. In important cases, however, he would undoubtedly seek Senatorial approval before taking action."<sup>1</sup>

When a treaty provides that it may be terminated upon notice, and the President gives such notice without authorization by Congress or the Senate, the foreign government has no right to inquire into the authority of the President to give such notice, but must assume that he is acting within his constitutional powers, and must, therefore, consider the treaty as having been terminated as an international contract through such Presidential notice. But the validity of a treaty as law of the land is dependent upon its binding force as an international compact. In other words, a treaty may be a binding international contract without being law of the land, as, for example, where Congress has acted to set it aside as such; but it cannot be law of the land when it has ceased to be a binding international compact. Therefore the act of the President in giving notice of a treaty's termination brings it to an end in both qualities or aspects. Although the President can be legally compelled by Congress to consider a treaty as having been abrogated in its character as law of the land, and can be *practically* forced by that body to denounce it to foreign governments, he

<sup>1</sup> Willoughby, *Constitutional Law of the U. S.*, I, 518.

cannot be legally compelled so to denounce it; while, on the other hand, he may freely denounce it if he wishes, and may thereby terminate it both internationally and municipally without the consent or approval either of Congress or of the Senate.

When a treaty lapses through self-limitation, or when it is susceptible of termination upon notice and the President transmits such notice, Congressional legislation passed for its enforcement, in so far as it is purely ancillary thereto, also lapses. In some cases, as was pointed out in a previous chapter, Congress may enact legislation for the enforcement of a treaty, which, in the absence of such treaty, would lie outside the range of its constitutional power. The operation of such legislation would, *a fortiori*, be suspended through the denunciation of the treaty by the President. The President, then, by due notice given as provided in the instrument itself, may terminate a treaty in its character of international compact and also in that of law of the land, not only when the treaty is self-executing and requires merely judicial and executive action for its enforcement, but also when legislation has been enacted for that purpose. Although he cannot, by giving such notice of termination, formally repeal valid enforcement legislation of Congress, he may render it entirely inoperative.

Without regard to whether a treaty provides for its own termination on notice, the President has power to consider it as having lapsed through adverse breach or other sufficient cause occurring outside the jurisdiction of the United States, and the courts regard themselves as bound by the Executive's determination of this matter.

When a treaty makes no provision for its own termination, the only method, in general, of bringing it to an end, both as an international compact and as law of the land, is a new exercise of the treaty-making power. In its quality as law of the land merely, however, a treaty, whether pro-



viding for its own termination or not, may undoubtedly be terminated (1) by act of Congress, either expressly abrogating it or passing legislation conflicting with it, or, (2) to all intents and purposes, by failure to enact legislation if any is needed for its enforcement. Finally, an act of Congress may terminate a treaty, both in its character of international compact and also in that of law of the land, in cases in which the Constitution confers on the two houses power to pass an act, such as one declaring war against a foreign nation, which is recognized in international law as having the effect of terminating certain kinds of treaties.

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## CHAPTER XXVIII

### NEUTRALITY AND THE MAINTENANCE OF PEACE

THE power of the President in connection with the beginning of war may be exercised either negatively or positively. By his negative power is meant the power to refrain from, or to keep the country out of, war. It may be as important, on occasion, as the power to bring on a war, although it has been given much less consideration. Congress has never declared war except in pursuance of at least a virtual recommendation of the President; and for practical purposes it may be assumed that although it has the legal power to declare war, quite independently, it will never actually take such a step without the President's approval.<sup>1</sup> The President's power of keeping the country out of war may be exercised in two classes of cases: first, where a situation exists in our relations with another country which might serve as a *casus belli* for the United States, but that country is not yet engaged in war, either with the United States or with any other power; and, second, where a war is in progress between other nations, and the United States refrains from entering the war on either side. The latter case is known as the policy or condition of neutrality.

Numerous instances have occurred in the history of our foreign relations in which the President, by a choice of diplomatic policies, has succeeded in keeping the country out of war. Under the Constitution, the power to change our relations with another country from those of peace to those of war is entrusted to Congress. But, as has been

<sup>1</sup> Even if this were not so, the President, in case an emergency arose during the recess of Congress, could, of course, postpone a formal declaration of war by failing to call a special session of that body.

stated, that body has never exercised the power except upon virtual recommendation of the President. On account of his control over the means and avenues of diplomatic intercourse, and his more intimate touch with the foreign relations of the United States, the President is usually in a better position than Congress to determine, in the first instance at least, whether a policy of peace or of war should be pursued. Congress may, of course, legally refuse to declare war when such action is recommended by the President, but it has never actually done so. On the other hand, the President may, through the exercise of his diplomatic powers, bring on a situation such that Congress would be practically compelled to declare war, whereas, by choosing the opposite path, he may keep the country out of war. Thus at the time of the Trent Affair in 1861 an unconciliatory attitude on the part of President Lincoln and Secretary Seward, or their refusal to release the Confederate commissioners, might easily have led to war with Great Britain. Again, during President Grant's administration, public opinion, both in Congress and in the country, was so inflamed against Great Britain, on account of her recognition of the belligerency of the Confederacy, her failure to prevent the *Alabama* and other Confederate ships from leaving her ports, and other grievances, that war might easily have been brought on, had not Grant and his Secretary of State, Hamilton Fish, endeavored to effect a settlement of the difficulties by diplomacy and arbitration. These efforts were successful and the differences between the two countries were settled by the award of the Alabama Claims Arbitration Tribunal at Geneva, constituted under the Treaty of Washington of 1871.<sup>1</sup>

Again, although President Wilson was, on different occasions, authorized by Congress to use force against Mexico, he persistently and successfully pursued the policy of avoiding a formal or full-fledged war with that country.

<sup>1</sup> Malloy, *Treaties, etc.*, I, 701.

In this connection it should also be mentioned that, although there was considerable sentiment in Congress in favor of a declaration of war against Turkey and Bulgaria at the time of our declaration against Austria-Hungary, war was, as a matter of fact, never declared against these states, for the reason that the President did not recommend it. The explanation which he gave was that, although these states were tools of Germany, they "do not yet stand in the direct path of our necessary action." Formal war was also avoided against France in 1798 through the failure of President Adams to recommend it,<sup>1</sup> and President Jefferson maintained peace in 1807 with Great Britain, despite strong provocation, by not calling a special session of Congress while excitement was at its height. The President cannot usually afford to recede from the maintenance of our national rights in the face of opposition. Yet, through the exercise of skilful diplomacy, he may escape gracefully from a difficult situation without seeming to sacrifice our national honor and dignity.

Congress also, by declining to pass legislative measures in support of the bellicose attitude of the President, may assist in keeping the country out of war. The failure of France to settle the spoliation claims according to her agreement in the treaty of 1831 led President Jackson, in 1835, to recommend that Congress grant him authority to seek redress through reprisals. The House of Representatives declared by resolution that preparations should be made to meet the emergency and that the execution of the treaty should be insisted upon. But the Senate was less wrought up; and when Clay, from the Committee on Foreign Relations, submitted a report opposing the grant that was asked, on the ground that reprisals would inevitably lead

<sup>1</sup> There was also considerable sentiment in Congress against war with France and a resolution was introduced providing that "under existing circumstances, it is not expedient for the United States to resort to war against the French Republic." The resolution, however, failed to pass. See *Annals of Congress*, 5th Cong., cols. 1319-20.

to war, a resolution was adopted to the effect that it was inexpedient at that time to pass any legislative measures regarding the relations between the two countries. This attitude of the Senate was probably largely instrumental in preventing the outbreak of hostilities.<sup>1</sup>

The President's sense of responsibility is doubtless greater, and it is usually he, rather than Congress or either branch thereof, that adopts the more conciliatory policy in time of difficulty with a foreign nation. To this rule there have, of course, been exceptions. The case of Jackson and the French treaty mentioned above is one of them; another is the Venezuela controversy with Great Britain during President Cleveland's administration, when the extreme position taken by the President and Mr. Olney, his Secretary of State, might easily have led to war, had the British Government adopted an equally firm attitude.<sup>2</sup> It must, of course, be remembered that, even though the President is extremely desirous of maintaining peace, and although he adopts every measure to that end consistent with our national honor and dignity, he will not always be able to prevent war, since war may be thrust upon us by a foreign nation against our will. Again, he may be unable to stem the tide of warlike excitement in Congress and among the people, fomented by the acts of the foreign nation, as in the cases of the War of 1812 and the Spanish-American War.

#### ARBITRATION

The policy of attempting to reach a settlement of international disagreements by arbitration when diplomacy fails is one to which the Government of the United States has almost uniformly adhered. In 1874 a resolution favoring general arbitration was passed by the House of Representatives, and in 1890 a concurrent resolution was passed by

<sup>1</sup> Moore, *Digest of Internat. Law*, VII, 123-7.

<sup>2</sup> It is true that in this case Congress, which had been generally hostile to the President, supported him.

both the House and the Senate requesting the President to invite negotiations with other governments looking toward the settlement of disputes by international arbitration.<sup>1</sup> A farther instance of Congressional sanction of this procedure is a paragraph of the naval appropriation act of 1916 in which Congress declared it to be "the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided," and "authorized and requested" the President to call an international conference to consider arbitration and disarmament.<sup>2</sup>

On the whole, however, the President, as the officer charged with direct responsibility for our foreign intercourse, has been more interested in arbitration than has Congress. Although, as noted above, President Cleveland adopted a firm, and rather extreme, attitude in the Venezuelan controversy with Great Britain, he was at the very moment insisting upon arbitration of the boundary dispute; and by his insistence he succeeded in having the matter settled in that way. Already, in 1893, he had laid before Congress a resolution favoring international arbitration, and had expressed his "sincere gratification that the sentiment of two great and kindred nations is thus authoritatively manifested in favor of the rational and peaceable settlement of international quarrels by honorable resort to arbitration."<sup>3</sup> In his inaugural address President McKinley declared that arbitration "is the true method of settlement of international as well as local or individual differences."<sup>4</sup> In this connection, however, it should be noted that, to the proposal of Spain that all differences

<sup>1</sup> Cf. Richardson, *Mess. and Pap. of the Presidents*, IX, 442.

<sup>2</sup> 39 U. S., Stat. at L., 618.

<sup>3</sup> Richardson, *op. cit.*, IX, 442.

<sup>4</sup> This opinion was expressed by the President in connection with his request for the Senate's approval of the British arbitration treaty of 1897. Approval was not given.

arising from the destruction of the battleship *Maine* should be submitted to arbitration, McKinley made no reply.<sup>1</sup>

The treaty-making power has attempted to control the war power both positively and negatively. By negative control, in this connection, is meant the attempt by the treaty power to maintain peace by preventing the war-declaring power from being exercised. Numerous treaties have been entered into by the United States, beginning with the Jay Treaty in 1794, providing for the arbitration of particular disputes, which, if otherwise unsettled, might have led to war. We have also entered into a number of general arbitration treaties. Thus the United States was a party to the Hague conventions of 1899 and 1907 providing for the peaceful settlement of international disputes by mediation, by international commissions of inquiry, and through the establishment of a so-called permanent court of arbitration at The Hague. In 1911 two agreements were negotiated with Great Britain and France providing for general arbitration; although on account of Senate amendments which the President was unwilling to accept they were abandoned. The action of the Senate in this case would seem to indicate that, although that body was not opposed to the general policy of international arbitration, it was less interested in the promotion of that policy than in the preservation of its constitutional functions, as it conceived them, in the exercise of the treaty-making power.<sup>2</sup>

On several occasions the United States has attempted to place an indirect or partial limitation, in the international sense, upon the war-declaring power of Congress, by becoming a party to treaties providing for the submission, by special agreement, of international differences, with certain exceptions, to the permanent court of arbitration at The Hague. The differences specified are those of a legal nature or relating to the interpretation of treaties existing

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, X, 148.

<sup>2</sup> Cf. also the reservation of the Senate to the Hague convention of 1907 for the settlement of international disputes. Malloy, *Treaties*, etc., II, 2247-8.

between the contracting parties.<sup>1</sup> In a more direct way, however, we have attempted to limit, in an international sense, the exercise by Congress of the war-declaring power, by entering into the so-called Bryan peace treaties, under which the United States agreed with a number of powers not to go to war with another contracting party pending investigation of the dispute by an international commission.<sup>2</sup> These treaties may be considered as forming a precedent for Articles XII and XV of the Covenant of the League of Nations, under which the contracting parties agree (1) not to resort to war until three months after an arbitrators' award has been made or the report of the Council of the League has been submitted, and (2) not to go to war at all with any party which complies with the recommendations of the Council's report. Such treaty provisions, however, merely place a moral or political obligation upon Congress in the international sense, and cannot affect the constitutional power of that body to declare war at its discretion.<sup>3</sup>

#### NEUTRALITY

The President may endeavor to avoid war, not only through the negotiation of treaties, but also through his diplomatic and executive powers irrespective of any treaty. When he does this with a view to avoiding entrance by the United States into a war already in progress between other nations, his policy is known as that of neutrality. In the case of some important wars, *e.g.*, the Franco-Prussian War of 1870 and the Russo-Japanese War of 1904, the United States declared, and succeeded in maintaining, its neutrality. Once the dogs of war among foreign nations are loosed, however, the likelihood that the United States will

<sup>1</sup> See, *e.g.*, 35 U. S. Stat. at L., 1994.

<sup>2</sup> See, *e.g.*, 38 U. S. Stat. at L., 1853.

<sup>3</sup> Cf. Mathews, "The League of Nations and the Constitution," *Mich. Law Review*, XVIII, 386 (March, 1920).



be drawn into the struggle is usually greater than in the case of an international dispute which has not yet reached the stage of armed combat. At two stages in our national history the problem of maintaining our neutrality in the face of warring nations of Europe became extremely serious. The first was the period of the Revolutionary and Napoleonic wars of 1793-1815; the second was that of the World War of 1914-1919. In both cases we at first attempted to maintain complete neutrality, which we succeeded in doing for a time; but in both cases, also, we suffered infringements of our neutral rights from both parties or groups of parties to the struggle, and in both cases we were ultimately drawn into the conflict. In both instances it was the President who decided upon our policy of neutrality and kept us to it as long as was feasible. When he ceased to be able to maintain the policy, his inability arose not so much from pressure on the part of Congress as from intolerable acts of aggression and infringement of our neutral rights on the part of some European power or group of powers.

Our entrance into the European war was advocated by some persons at the time of the German invasion of Belgium in 1914, and the same step was urged by some at the time of the sinking of the *Lusitania* by a German submarine in the following year. Both of these incidents—certainly the latter—might have been considered a sufficient *casus belli* by even a slightly bellicose President. In both instances, however, as well as on the occasion of the *Sussex* outrage, President Wilson avoided war, and not until it became manifest to everybody that Germany had no intention of regarding our neutral rights did he finally decide to recognize the state of war thus thrust upon us.

Opposition arose in Congress in 1916 to the policy of the administration in declining to warn American citizens against traveling on the high seas in defensively armed merchantmen. Many members of that body believed that

this policy would inevitably lead to war. The McLemore resolution, which requested the President to give such warning, was tabled by a vote of almost two to one. It was, however, a determined attempt on the part of Congress to interfere with the complete control which the President exercised over the diplomatic issues involved in the relations between the United States and the warring nations of Europe. The President maintained that these were matters for his sole determination; and the defeat of the resolution seems to have been, to some extent at least, a Congressional recognition of the correctness of his position.

In the campaign of 1916 the country was urged to reëlect President Wilson because "he kept us out of war"; and not long afterwards he was being criticized on the score that, after being reëlected partly on the strength of that slogan, he had "got us into war." Without passing upon the merits of his course at any stage, the incident may merely be cited as indicating that, in popular estimation, the executive is the department of the Government which determines the question of peace or war.

It is customary for the President, at the outbreak of a war to which the United States is not a party, to issue a proclamation of neutrality between the belligerents. This was done for the first time by President Washington in 1793, upon the outbreak of war between France and Great Britain.<sup>1</sup> The proclamation issued on this occasion is a landmark in the history both of international law and of the governmental practice and policy of the United States toward European powers. It was put forth by the President after consultation with his cabinet, but without any express authorization by Congress; and inasmuch as the Constitution contains no provision expressly granting the power either to the President or to Congress, difference of

<sup>1</sup> *Am. State Papers, For. Rel.*, I, 140. For facsimile reproduction of this proclamation, see Moore, *Principles of American Diplomacy*, 41.

opinion naturally arose as to whether the President really has the power to issue a proclamation of the sort.

Debate on this question was carried on notably by Hamilton, who assumed the pen-name of "Pacificus," and by Madison, who wrote under the name of "Helvidius."<sup>1</sup> Madison argued, that the right to judge whether, under the existing treaty of alliance with France, the United States was obliged to declare war was included within the war-declaring power, and therefore belonged to Congress. Moreover, he endeavored to impale "Pacificus" on the logical horns of the dilemma that Congress is free to exercise, at its discretion, its war-declaring power and is at the same time bound by the Presidential proclamation of neutrality not to declare war.

The problem involved is essentially the same as that previously adverted to in considering efforts of the treaty power to control the power of Congress to declare war and to appropriate money. The constitutional discretion of Congress in the exercise of the last-mentioned powers must remain unfettered in spite of any treaty; otherwise the Constitution could be amended through the exercise of the treaty power. Likewise, the constitutional power of Congress to declare war remains legally unfettered by the previous action of the President in issuing a proclamation of neutrality, although that officer's action in this respect will naturally be taken into consideration by Congress as a factor in its decision to declare war or not to do so. Although, in practice, as is indicated above, Congress has never declared war except in pursuance of the recommendation of the President, it has the legal power to do so without such recommendation, and its failure to do so, provided it is in session during the progress of a war between foreign nations, may be taken as a sufficient indication of

<sup>1</sup> The substance of the constitutional arguments of these two writers is reprinted in Corwin, *The President's Control of Foreign Relations*, 8-27.

its intention that the country shall remain neutral.<sup>1</sup> The action of the President, therefore, in issuing a proclamation of neutrality under such circumstances is merely an official recognition and notification, to other nations as well as to our own citizens, by that department of our Government which is charged with the conduct of foreign intercourse, that we espouse the cause of neither side in the conflict, but propose to remain at peace; and the President's act may be considered as merely reinforcing and expressing the implied attitude of Congress, as evidenced by its failure to declare war. Nothing is more obvious than that it is the duty of the President, in conducting our international relations, to inform foreign governments what our policy is in matters of peace and war. A neutrality proclamation is one of several means of doing so.

At the time of the receipt of news in this country in April, 1793, that war had broken out between France and Great Britain, Congress had adjourned, and it had not yet reconvened at the time when Washington issued his proclamation. Consequently, it had no opportunity to give evidence of its attitude until the beginning of the next session, several months after the proclamation was issued. By passing an act or resolution declaring war, and by repassing it over the President's veto if necessary, it might then have nullified or reversed the policy that had been proclaimed. But it failed to do this. Likewise, the President, in view of changed conditions, might have abandoned his former attitude by recommending to Congress that it declare war, as President Wilson did in 1917 after issuing his proclamation of neutrality in 1914. This, also, was not done. After Congress has declared war, and while hostilities are in progress, the President cannot, by issuing a proclamation of neutrality, restore peace. It is then his

<sup>1</sup>On this point compare the debate on the proposed Congressional resolution of 1798 that "under existing circumstances, it is not expedient for the United States to resort to war against the French Republic." *Annals of Congress*, 5th Cong., cols. 1319-1320. For discussion of this case, see below, p. 564.

constitutional duty to enforce the laws passed by Congress for the prosecution of the war, including the declaration of the intention of our Government to pursue the contest to a successful termination.

In the discussion referred to above Hamilton maintained that "the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed" in the Constitution. Hence the President had the right to issue the proclamation, since the general powers relating to peace and war are vested in him, subject only to the limitation that the power of changing the condition of the country from one of peace to one of war is expressly vested by the Constitution in Congress. This view has been sanctioned by the practice of subsequent Presidents, is supported by the analogous power of the President to remove from office, and has received the implied approval of the Supreme Court in construing the powers of the judicial department of the Government.<sup>1</sup>

Although the President had the power to issue the proclamation of neutrality in 1793, there were not adequate laws for the strict enforcement of the policy upon our own citizens. Consequently, on Washington's recommendation, Congress, which is empowered by the Constitution to define and punish offenses against international law, passed penal statutes in 1794, and again in 1797, 1818, and at later dates, steadily enlarging the code and extending the jurisdiction of the courts in enforcing the neutrality laws.<sup>2</sup> Numerous cases have come up in the courts involving the interpretation and enforcement of these measures. It was provided, furthermore, that when the violation of our neutrality laws should be attempted on such a scale that the courts would probably not be able to enforce them, the President might

<sup>1</sup> *Kansas v. Colorado*, 206 U. S., 46, where it is pointed out that the Constitution does not make a general grant of legislative power to Congress, while, on the other hand, the entire judicial power of the nation, subject only to express limitations, is vested in the courts. Quoted in Corwin, *op. cit.*, 31.

<sup>2</sup> For the text of these acts, see C. G. Fenwick, *Neutrality Laws of the United States* (Washington, 1913), appendix.

employ the land and naval forces of the United States for the purpose.<sup>1</sup> Administrative action in the enforcement of the neutrality laws may be invoked also through the power of the United States district attorneys, under the direction of the President and the Attorney-General, to secure evidence and commence legal proceedings against violators, and through the power of the collectors of the customs, acting under the instructions of the Secretary of the Treasury, to detain vessels about to depart from our shores in violation of our neutrality.<sup>2</sup>

In view of unsettled conditions in Mexico in 1912 it seemed expedient to the President to concentrate a number of troops along the border, so as to prevent evasion of our neutrality laws; and in order to assist in achieving this purpose, Congress passed, in that year, a joint resolution empowering the President to prohibit the shipment of arms or munitions of war to any American country where conditions of domestic violence exist.<sup>3</sup> In pursuance of this important extension of his power, the President has on several occasions issued proclamations prohibiting the export of arms and munitions to Mexico. In 1915 Congress passed a joint resolution "to empower the President to better enforce and maintain the neutrality of the United States," authorizing him to direct the collectors of customs to detain vessels about to sail from our ports in violation of our neutral obligations, and to employ the land or naval forces to carry out the purpose of the resolution.<sup>4</sup>

It remains to point out the connection between the President's power of recognition and his power of issuing neutrality proclamations. It is axiomatic that a state cannot be neutral except as between two other contending states or groups of states. It follows that, when the President

<sup>1</sup> Sect. 9 of the act of 1818. Cf. *Gelston v. Hoyt*, 3 Wheat., 246, cited by Fenwick, *op. cit.*, p. 149. See also 21 Op. of Atty.-Gen., 267, 273, quoted in Moore, *Digest of Internat. Law*, VII, 1029.

<sup>2</sup> Sect. 11 of the act of 1818, Fenwick, *op. cit.*, 179.

<sup>3</sup> Text of resolution in Fenwick, *op. cit.*, 158.

<sup>4</sup> 38 Stat. at L., pt. 1, p. 1226.

proclaims neutrality between two contending parties, he thereby indirectly recognizes them as having for the time being the status of belligerency, if not of complete independence. When he proclaims neutrality between a generally recognized state and its revolting colony or dependency or a body of insurrectionists within its territory, his action is equivalent to a recognition by him of the latter as, for the time being, a *de facto* government. Thus President McKinley declared, in a message to Congress on Cuban affairs: "In the code of nations there is no such thing as a naked recognition of belligerency, unaccompanied by the assumption of international neutrality. . . . The act of recognition usually takes the form of a solemn proclamation of neutrality, which recites the *de facto* condition of belligerency as its motive."<sup>1</sup> Furthermore, a proclamation issued by the President declaring the existence of an insurrection within a friendly country and warning American citizens that participation in such disturbances constitutes a violation of our neutrality laws has been held by the Supreme Court to be tantamount to a recognition of a condition of insurgency, even though no recognition of belligerency has taken place.<sup>2</sup> Such a proclamation was issued by President Cleveland in 1895 with regard to the Cuban insurrection.

The concept of neutrality has doubtless lost something of its importance since 1914. The World War demonstrated the futility of the attempt to maintain neutrality on the part of a proud and commercially important nation in the face of desperate warfare conducted on a world-

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, X, 133.

<sup>2</sup> *The Three Friends*, 166 U. S., 1. On the difficulties we encountered in connection with the maintenance of our neutrality during the Cuban insurrection, see the responses of the Secretary of the Treasury to House and Senate resolutions requesting information regarding filibustering expeditions to Cuba and measures adopted to thwart violations of our neutrality off the coast of Florida (Sen. doc. 35, and House doc. 326, both of the 55th Cong., 2d sess.). Cf. "The Law of Hostile Military Expeditions as Applied by the U. S.," *Am. Jour. Internat. Law*, VIII, 1, 224.

wide scale.<sup>1</sup> In view of this fact, the Covenant of the League of Nations (Article XVI) provides for the automatic creation of a state of war between a peace-breaking member and all of the remaining members. Thus is frankly recognized the inescapable truth that the members of the League cannot and should not remain neutral in the face of an invasion of the peace of the world, even though they may not be immediately or directly attacked.<sup>2</sup> Despite the decreasing importance of the concept of neutrality, however, the right and the capacity of the President, through the exercise of his diplomatic and executive functions, to maintain the peace and to avert resort to arms must be, in the future as in the past, of tremendous importance for the welfare of the nation.

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<sup>1</sup>R. F. Roxburgh, "Changes in the Conception of Neutrality," *Journal of Comparative Legislation*, April, 1919, p. 23.

<sup>2</sup>Mathews, "League of Nations and the Constitution," *Michigan Law Review*, XVIII, 384 (March, 1920).



## CHAPTER XXIX

### FORCIBLE MEASURES SHORT OF WAR

THE use of the armed forces of the United States in such a manner as to derogate from the effective sovereignty of a foreign country has frequently taken place without a formal declaration of war by Congress. Such use of armed forces may or may not amount to intervention, in the sense in which that term is employed in international law. Intervention may be either political or non-political. If, as is usually the case when the United States is involved, it is non-political, it partakes of the character of non-belligerent interposition,<sup>1</sup> and as such may be undertaken with or without the consent of the government of the foreign country concerned. In the nature of the operations involved, although usually not in their extent, it may differ but little from war in the material sense; and it may develop into war, through the action of either party in recognizing it as such. Until so recognized, it differs from war in that the juridical results of the status of war are not produced as between the parties involved; and in that third powers are not charged with the duties of neutrals under international law. It does not necessarily result in war and may, indeed, be adopted purposely as a measure to prevent war. The power of the President to use the armed forces of the country not only extends, as we shall see, to repelling actual invasion of our territory and recognizing the existence of a state of war through foreign aggression, but may be exerted in and against foreign countries or on the high seas in the protection of

<sup>1</sup> Cf. Borchard, *Diplomatic Protection of Citizens Abroad*, 448.

the rights and interests of the Government and citizens of the United States. In this chapter we are concerned with the use of armed force by our Government in those cases only in which the actual resort to force was neither preceded nor followed by a formal declaration of war by Congress.

The power of the President as commander-in-chief to direct, in time of peace, the non-hostile movements of our military forces on our own territory and of our naval forces on the high seas and into foreign ports and territorial waters merges almost imperceptibly into his power to direct the movements of those forces in such a manner as to constitute an actual or potential exercise of physical pressure against a foreign country. In its preliminary stage, a non-hostile movement may go no farther than a mere display of force; actual use of force may or may not result. Thus in the early part of the nineteenth century the United States maintained a small squadron in the Mediterranean Sea as an alternative to paying tribute to the Barbary states for the security of our commerce in those waters.<sup>1</sup> Again, in 1911 President Taft directed the mobilization of twenty thousand American troops on the Mexican border, in view of the disturbed conditions in that country.<sup>2</sup> When, in 1895, an American warship was sent to Turkish waters, Secretary Olney notified the Turkish minister that "the visit of the *Marblehead* to Turkish waters at this junction is in pursuance of a long-established usage of this Government to send its vessels, in its discretion, to the ports of any country which may for the time being suffer perturbation of public order and where its countrymen are known to possess interests. This course is very general with all other governments, and the circumstance that a transient occasion for such visits may exist

<sup>1</sup> See Moore, *Digest*, VII, 107, and other instances there cited.

<sup>2</sup> *For. Rels. of U. S.*, 1911, p. XII.

does not detract from their essentially friendly character.”<sup>1</sup>

In going beyond a mere display of force to the actual exercise thereof the President usually conforms his action to the rules of international law, which recognize the right of a nation, under certain circumstances, to resort to non-amicable measures of redress short of war, such as reprisals, pacific blockade, and other forms of non-belligerent interposition. In the case of the *Paquette Habana*,<sup>2</sup> the Supreme Court declared that “international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.” This is the rule which must be regarded as applying when the President, as commander-in-chief, directs the movements of our forces in non-amicable measures short of war. Action of this kind has usually been taken in Latin America rather than in Europe or Asia, and in recent years it has been so frequent as to have become a main factor in developing a new and more sweeping interpretation of the Monroe Doctrine. The explanation lies largely, of course, in our proximity to the Latin American world, in the lack of order and stable government there, in our acquisition of islands in the Caribbean, and in our construction of and interest in the Panama Canal.

It has been pointed out in a previous chapter that, by virtue of his powers as commander-in-chief of the army and navy, the President may enter into executive agreements during time of peace. He may also, of course, conduct diplomatic negotiations which do not develop into executive

<sup>1</sup> *For. Rel. of U. S.*, 1895, II, 1324, quoted in Borchard, *Diplomatic Protection of Citizens Abroad*, 448. Cf. *ibid.*, II, 1257.

<sup>2</sup> 175 U. S., 677, 700.

agreements and do not relate specifically to military or naval matters. The combination in the person of the President of the offices of diplomatic head of the nation and commander-in-chief of the armed forces enables these powers to supplement each other in the attainment of the objects of our foreign policy. With a view, for example, to emphasizing his diplomatic representations, the President may, as already indicated, cause naval or military demonstrations to be made in the appropriate localities, as in the case of Panama in 1903 and in that of Santo Domingo in 1905. In the latter instance the object was to maintain a diplomatic situation pending action upon a treaty by the Senate.<sup>1</sup>

In a memorandum of the solicitor of the Department of State will be found a list of the cases, down to 1912, in which the forces of the United States have landed on foreign soil for the purpose of protecting American interests in accordance with general international right, there being in all of these instances no treaty right involved, no declaration of war by Congress, and no existing diplomatic difficulty between the two countries.<sup>2</sup> About fifty instances are enumerated, from the landing on Amelia Island in 1811 to that in Honduras in 1911. The principal purposes for which our forces were thrown upon foreign soil in this period were the simple protection of American citizens in disturbed areas; punishment of natives for the murder of, or injuries committed against, American citizens; suppression of local riots; preservation of order; and securing an indemnity, or seizing custom houses, as satisfaction for injuries and insults to the American flag and uniform.<sup>3</sup>

In some instances the action was taken by our military or naval commanders without specific authorization from

<sup>1</sup> See Foster, *Practice of Diplomacy*, 327, and passages in Cong. Record there cited. Cf. Willoughby, *Constitutional Law*, I, 472.

<sup>2</sup> J. Reuben Clark, *Right to Protect Citizens in Foreign Countries by Landing Forces* (Washington, 1912).

<sup>3</sup> *Ibid.*, pp. 31 *et seq.*, and appendix.

the Government, and therefore on their own responsibility. Thus, as stated by the Secretary of the Navy in 1904, "the crises at Panama have developed so quickly that the [Navy] Department, prior to 1885, had small opportunity to issue special instructions, but the senior naval officer present took such measures as seemed necessary."<sup>1</sup> Such action of military or naval commanders has sometimes been disavowed.<sup>2</sup> In most cases, however, it has been supported, thereby becoming the official action of the Government itself.

The President may use the armed forces of the United States in or against a foreign country, by way of non-belligerent interposition, under three different conditions: (1) when acting solely under his constitutional authority as commander-in-chief and under general international right, without specific authority of Congress or either branch thereof; (2) when acting with the consent of both branches of Congress as embodied in an act or joint resolution, which, however, is not, at least in form, a declaration of war; and (3) when acting with the concurrence of the Senate, as well as of the government of the country against which, or in whose behalf, the forcible operation takes place, as embodied in general terms in a previous treaty.

#### SIMPLE PRESIDENTIAL ACTION

One of the most important cases of the first type arose in China in 1900, when it became necessary to defend the

<sup>1</sup>"Use by the United States of a Military Force in the Internal Affairs of Colombia," Senate doc. 143, 58th Cong., 2d sess., p. 77.

<sup>2</sup>Thus when Commodore Porter landed two hundred men in Porto Rico in 1824 to avenge insults which the local authorities had visited upon the officers of an American vessel, our Government disavowed the action on the ground that he had overstepped the limits of his powers. *Ibid.*, 49-50. In the case of the occupancy of Amelia Island by General George Matthews in 1812, which he deemed to be in accordance with his general instructions, the Government disavowed the methods which he pursued, but nevertheless retained possession of the Island. *American State Papers, Foreign Relations*, III, 571-2; Henry Adams, *History of the United States*, VI, 237-43; Richardson, *Mess. and Pap. of the Presidents*, I, 506-8.

Western legations against the attacks of the Boxers. Congress was not in session when the emergency arose, and in joining the other powers in sending an expedition to Peking the President acted on his own authority. This has been called "one of the most extreme acts of executive authority in the history of the United States."<sup>1</sup> But it was justified by the urgency of the situation and was supported by public opinion. As President McKinley said: "Our declared aims involved no war against the Chinese nation. We adhered to the legitimate office of rescuing the imperiled legation, obtaining redress for wrongs already suffered, securing wherever possible the safety of American life and property in China, and preventing a spread of the disorders or their recurrence."<sup>2</sup>

Another illustration is the celebrated case of Martin Koszta, whose detention by Austrian authorities in 1853 led the captain of an American warship to clear his decks for action. The captain's act was fully supported by the executive department of our Government, and Congress indicated its approval by voting a gold medal; although, since Koszta was not a fully naturalized citizen, our right under international law to protect him by force was rather tenuous.<sup>3</sup>

Still another case is the landing of American marines in Haiti in 1915 to protect American interests which were jeopardized by a revolution. Although authorized by no act of Congress or treaty, American officials administered the customs at all Haitian ports and later supervised the national election. A treaty was entered into in the following year, however, which regulated such procedure on our part for the future.<sup>4</sup>

An interesting case of purely executive action also oc-

<sup>1</sup> Foster, *American Diplomacy in the Orient*, 421.

<sup>2</sup> Annual Message, Dec. 3, 1900, *For. Rels.*, 1900, pp. XIII ff.; see also *ibid.*, pp. 102 ff.

<sup>3</sup> W. F. Johnson, *America's Foreign Relations*, I, 531-3; cf. a dictum by the Supreme Court in *re Neagle*, 135 U. S., 64.

<sup>4</sup> 39 Stat. at L., p. 1659; cf. also 39 *ibid.*, p. 223.

curred in 1854 when Captain Hollins of the U. S. S. *Cyane*, after public proclamation, bombarded Greytown, Nicaragua, to avenge insults visited upon the American minister.<sup>1</sup> His action was supported by President Pierce,<sup>2</sup> and in a case involving the matter the lower federal court said: "As respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President."<sup>3</sup>

In view of insults and indignities committed by the forces of General Huerta against the American flag and the person of American sailors landed for peaceful purposes from our vessels in the harbors of Tampico and Vera Cruz, President Wilson, on April 20, 1914, appeared before a joint session of Congress, declaring that he had come to ask the approval and support of that body in the course which he had decided to pursue. "No doubt," he said, "I could do what is necessary in the circumstances to enforce respect for our Government without recourse to the Congress and yet not exceed my constitutional powers as President, but I do not wish to act in a matter possibly of so grave consequence except in close conference and coöperation with both the Senate and House. I therefore come to ask your approval that I should use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from General Huerta and his adherents the fullest recognition of the rights and dignity of the United States."<sup>4</sup>

Two days later Congress passed a joint resolution which declared that "the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and

<sup>1</sup> J. Reuben Clark, *Memorandum of Solicitor*, 53.

<sup>2</sup> Richardson, *Mess. and Pap. of the Presidents*, V, 282; see also Moore, *Digest of Internat. Law*, VII, 112-6.

<sup>3</sup> 4 Blatchford, 451, quoted in Corwin, *President's Control of Foreign Relations*, 145. For other instances, see Moore, *Digest of Internat. Law*, VII, sect 1093.

<sup>4</sup> Congressional Record, April 20, 1914, vol. 51, p. 6909.

indignities committed against the United States.”<sup>1</sup> The President had asked for approval, not for authority; hence the use of the word “justified” rather than of “authorized.” In order to make clear that this did not constitute a declaration of war or an authorization to wage war, the resolution added that “the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico.”<sup>2</sup>

While deeming it expedient to secure the support of Congress, President Wilson did not consider any action by that body to be legally necessary in order that he might adopt forcible measures in Mexico. This is shown by his action on April 21, the day before the joint resolution was passed, in landing forces and seizing the custom house and other buildings at Vera Cruz, with the loss of several men killed and injured. The failure to wait for the passage of the resolution by Congress was doubtless due to the approach of a German ship carrying arms and ammunition. In the absence of a state of war it was considered of doubtful legality to establish a blockade effective for third states and so detain this ship; but by seizing the custom house the munitions could be prevented from reaching General Huerta.

The occupation of Vera Cruz continued about seven months. On April 23 the Mexican foreign minister handed our *chargé d'affaires* at Mexico City his passports with a note which declared that “according to international law, the acts of the armed forces of the United States . . . must be considered as an initiation of war against Mexico.”<sup>3</sup> The situation thus brought on by the President under the provocation of Huerta, while technically a reprisal, certainly constituted material, if not legal, war, and it might

<sup>1</sup> 38 Stat. at L., p. 770.

<sup>2</sup> *Ibid.*

<sup>3</sup> *American Year Book*, 1914, p. 35.



easily have developed into legal war, in spite of the fact that Congress had neither declared war nor authorized the use of force by the President.

#### PRESIDENTIAL ACTION WITH CONGRESSIONAL CONCURRENCE

The second class of cases of the President's use of force short of war consists of those in which he acts with the consent or concurrence of Congress. Sometimes the action of Congress takes the form of expressly authorizing the President to use the public armed forces of the United States to defend American rights and to repel aggression. The appropriation by Congress of funds to support and maintain an army and navy is sufficient action on the part of that body to enable the President, as commander-in-chief, to use force for those purposes. No special authorization is legally necessary, although it may be given with a view to showing the practical coöperation of the two houses in presenting a united front against foreign aggression.

The occasions on which Congress has authorized or concurred in the use of force by the President are numerous. Acts of 1807 and 1819 authorized and requested him to employ the armed vessels of the United States to capture slave-smuggling ships and to protect our merchant ships and crews from piratical aggressions:<sup>1</sup> A secret act of 1811 authorized him "to take possession of and occupy . . . the territory lying east of the River Perdido and south of the state of Georgia" and provided that for this purpose, and in order to maintain therein the authority of the United States, "he may employ any part of the army and navy of the United States which he may deem necessary."<sup>2</sup>

The Constitution authorizes Congress to provide for calling forth the militia to execute the laws and repel invasions, and in pursuance of this power general statutes

<sup>1</sup> 2 Stat. at L., 428; 3 Stat. at L., 511.

<sup>2</sup> 3 Stat. at L., 471.

were passed in 1795 and 1807 declaring it to be lawful for the President to call forth the militia and to employ the land and naval forces of the United States to suppress insurrection or to repel invasion from any foreign nation or Indian tribe.<sup>1</sup> Congress, of course, is not always in session, and when it becomes necessary to defend the country against sudden and unexpected aggression the President is bound to act, even before Congress has assembled. In such a case, moreover, the President acts under his constitutional authority to see that the laws are faithfully executed, since an invasion necessarily interferes with the complete enforcement of federal law on our territory. The Supreme Court has held that, in the matter of repelling invasion, the President is the sole judge of whether the exigency warrants calling out the forces.<sup>2</sup>

During the controversy with Great Britain over the Northeast boundary line Congress passed, in 1839, an act authorizing the President "to resist any attempt on the part of Great Britain to enforce by arms her claim to exclusive jurisdiction over that part of the state of Maine" which was in dispute; and for that purpose to employ the naval and military forces of the United States and such portions of the militia as he might deem it advisable to call into service. The act further authorized him to accept the service of volunteers in case of actual or imminent invasion of the territory of the United States at a time when Congress was not in session and could not be convened in time to act upon the subject.<sup>3</sup>

A case of reprisal authorized by Congress occurred in 1858, when, by joint resolution, it was provided that "for the purpose of adjusting the differences between the United States and the republic of Paraguay in connection with the attack upon the United States steamer *Water Witch* . . . the President is hereby authorized to adopt such measures

and use such force as in his judgment may be necessary and advisable in the event of a refusal of just satisfaction by the Government of Paraguay.”<sup>1</sup> The resolution was opposed in the Senate on the ground that it authorized the President “to commence war in his discretion,” but this contention was rebutted by the measure’s supporters.<sup>2</sup> In this connection should be mentioned also the act of 1856 which authorized the President, at his discretion, to employ the land and naval forces of the United States to protect the rights of American discoverers of guano islands.<sup>3</sup>

There is thus abundant precedent for action by Congress authorizing the President to use force against foreign powers without going so far as to declare war. It does not follow, however, that because Congress “authorizes” the President to use force, he would not have such authority independently. It is merely deemed good policy that the President should have the moral support of the legislative branch, irrespective of the question of legal power. It is true that President Buchanan took the view that Congressional authorization is necessary to enable the President to conduct warlike operations, except to repel an actual attack of an enemy. In accordance with this belief, he requested Congress to authorize him to use force for the protection of American lives and property against unlawful attack while traversing the ocean-to-ocean transit routes in Central America.<sup>4</sup> Most other Presidents, however,

<sup>1</sup> Joint Resolution of June 2, 1858, 11 Stat. at L., 370. Cf. also the joint resolution of June 19, 1890, which became law without the President’s signature, authorizing reprisals against Venezuela. 26 Stat. at L., 674.

<sup>2</sup> Cong. Globe, 35th Cong., 1st sess., pt. II, pp. 1704, 1727, 1783, 1929. *Memo-randum of the Solicitor*, 34. For an account of the circumstances of the attack on the *Water Witch*, see Moore, *Digest of Internat. Law*, VII, 109-12.

<sup>3</sup> Act of Aug. 18, 1856, 11 Stat. at L., 120.

<sup>4</sup> Richardson, *Mess. and Pap. of the Presidents*, V, 570. Buchanan, however, did not always consistently hold this view. See, for example, his apparently approving comments upon the destruction of the Barrier forts in China by our squadron to avenge an alleged insult to our flag, and upon the dispatch of a naval force to Cuban waters to protect American vessels from search and detention by warships of any other nation. Both actions were taken without express Congressional authority. Richardson, *Mess. and Pap. of the Presidents*, V, 506-7. Mr. Cass, his Secretary of State, said in 1857 that “our naval officers

have not shared Buchanan's view. Even Jefferson, although admitting that "Congress alone is constitutionally invested with the power of changing our condition from peace to war," sent a small squadron of frigates into the Mediterranean, without Congressional authorization, with orders to protect our commerce against threatened attack.<sup>1</sup> This attitude seems also to be taken by the Supreme Court, judging from the line of reasoning adopted in the Prize cases, and also by analogy from the doctrine laid down in the Neagle case to the effect that the President may exercise his constitutional powers without waiting, in all cases, for ancillary Congressional legislation.<sup>2</sup> Since such legislation is not a necessary accompaniment of Presidential action, it follows that Congress has no special power to direct the President in the use of the armed forces in operations not amounting to foreign war.<sup>3</sup>

#### PRESIDENTIAL ACTION UNDER TREATY AUTHORIZATION

We may now consider the power of the President to use force with the concurrence of the Senate and with the consent, as embodied in a previous treaty, of the government of the country against which, or in whose behalf, the forcible operation takes place. Under our treaty of 1846 with New Granada (Colombia) we guaranteed the "perfect neutrality" of the Isthmus of Panama and the rights of sovereignty and property which New Granada had over that territory,<sup>4</sup> and by the Clayton-Bulwer Treaty of 1850 we entered into a similar covenant with Great Britain

have the right—it is their duty, indeed—to employ the forces under their command, not only in self-defense, but for the protection of the persons and property of our citizens when exposed to acts of lawless outrage, and this they have done both in China and elsewhere." He added, however, that "military expeditions into Chinese territory cannot be undertaken without the authority of the national legislature." Moore, *Digest of Internat. Law*, VII, 164.

<sup>1</sup> Moore, *Digest of Internat. Law*, VII, 162.

<sup>2</sup> 135 U. S., 1. Cf. *Logan v. U. S.*, 144 U. S., 263, 294.

<sup>3</sup> Cf. *Memorandum of the Solicitor*, 36.

<sup>4</sup> Malloy, *Treaties, etc.*, 312.

respecting the Isthmian canal.<sup>1</sup> Further, through our treaty of 1904 with Panama we undertook to guarantee and maintain the independence of that republic.<sup>2</sup> In this same agreement we reserved the right to employ armed forces, if it should become necessary, for the safety or protection of the canal, and to use at any time and in our discretion our police and land and naval forces, or to establish fortifications for these purposes.<sup>3</sup> "These treaty provisions do not go so far as to require a declaration of war on our part, but they almost necessarily imply intervention or warlike measures by us in case the independence or neutrality guaranteed is threatened or in imminent danger."<sup>4</sup> As a matter of fact, in pursuance of the above-mentioned provision of the treaty of 1846 with New Granada, the United States has on several occasions landed forces on the Isthmus of Panama. In September, 1902, such forces were landed solely on the initiative of the United States, although the Panama authorities were informed in advance. Usually, these landings were made at the request of the authorities of New Granada (or Colombia), and for the purpose of protecting United States property and maintaining order and the freedom of transit across the Isthmus under the provisions of the treaty.<sup>5</sup>

The peculiar relations existing between the United States and the states of Central America have, as previously indicated, led to numerous landings of American forces in those countries without a declaration of war. In this connection ex-President Taft says:

"What constitutes an act of war by the land or naval forces of the United States is sometimes a nice question of law and fact. It really seems to differ with the charac-

<sup>1</sup> Malloy, *Treaties*, etc., 664.

<sup>2</sup> *Ibid.*, 1349.

<sup>3</sup> *Ibid.*, 1356.

<sup>4</sup> Mathews, "The League of Nations and the Constitution," *Mich. Law. Rev.*, XVIII, 385 (March, 1920).

<sup>5</sup> "Use by the United States of a Military Force in the Internal Affairs of Colombia," etc., Senate Doc. 143, 58th Cong., 2d sess., pp. 2-3.

ter of the nation whose relations with the United States are affected. The unstable condition as to law and order of some of the Central American republics seems to create different rules of international law from those that obtain in governments that can be depended upon to maintain their own peace and order. It has been frequently necessary for the President to direct the landing of naval marines from the United States vessels in Central America to protect the American consulate and American citizens and their property. He has done this under his general power as commander-in-chief. It grows not out of any specific act of Congress, but out of that obligation, inferable from the Constitution, of the government to protect the rights of an American citizen against foreign aggression. . . . In practice the use of the naval marines for such a purpose has become so common that their landing is treated as a mere local police measure, whereas if troops of the regular army are used for such a purpose it seems to take on the color of an act of war.”<sup>1</sup>

He adds that during his administration an insurrection in Nicaragua led to the landing of some of our marines and to “quite a campaign” for the protection of American citizens and their property.

The landing of American forces in Nicaragua in 1912 came by way of practical enforcement of that provision of the Washington Conventions of 1907 between the five Central American republics which declared that “every disposition or measure which may tend to alter the constitutional organization in any of them is to be deemed a menace to the peace of said republics.”<sup>2</sup> The United States, it is true, was not formally a party to these conventions. But the agreements were concluded under the auspices of our Government, and an official statement of the policy of the United States in the Nicaragua case was made to the effect that the measures which we found it necessary to take in

<sup>1</sup> *Our Chief Magistrate and His Powers*, 95-6.

<sup>2</sup> Malloy, *Treaties*, etc., 2393.

that country in 1912 were in pursuance of the "moral mandate" which the United States had under the Washington Conventions.<sup>1</sup>

#### LATIN AMERICAN PROTECTORATES <sup>1a</sup>

The policy of intervention pursued by the United States in continental Latin America has for its main precedents the relation set up between the United States and Cuba as a result of the Spanish-American war. The terms of this relation were embodied both in an act of Congress and in a treaty. By the Platt Amendment of 1901, Congress stipulated that, as a condition of the withdrawal of American troops from Cuba, a government should be established in that island under a constitution providing, among other things, that the new government should itself consent that the United States should "exercise the right to intervene for the preservation of Cuban independence and the maintenance of a government adequate for the protection of life, property and individual liberty."<sup>2</sup> The substance of this provision was embodied not only in the Cuban constitution but also in a treaty between the United States and Cuba, ratified in 1904.<sup>3</sup> Two years later the disordered condition of affairs in the island compelled the United States to intervene in accordance with the agreement. A provisional military government displaced the Cuban government and held the field for more than two years. Early in 1909, however, American troops were again withdrawn, and the Cubans resumed control. No subsequent intervention has taken place, although in 1912, and again in 1917, one was threatened.<sup>4</sup>

Our relations with Cuba, which thus make of that island a virtual protectorate of the United States, have served

<sup>1</sup> *For. Rels. of U. S.*, 1912, pp. 1042-4.

<sup>1a</sup> For recent developments affecting the content of this section, see above, Chap. IV.

<sup>2</sup> Act of March 2, 1901, 31 Stat. of L., 897.

<sup>3</sup> Malloy, *Treaties*, etc., 364.

as a model and precedent, to some extent at least, for the development of similar relations with other Latin American countries, especially Haiti, San Domingo, Panama, and Nicaragua. Thus in a clause manifestly modeled on the Platt Amendment a treaty of 1915 with Haiti provides that "should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian independence and the maintenance of a government adequate for the protection of life, property, and individual liberty."<sup>1</sup> Opportunity to lend the "efficient aid" specified, by landing marines for police purposes, has not been wanting. The Haitian treaty provides also that the insular constabulary shall be organized and officered by Americans, to be appointed by the President of Haiti on the nomination of the President of the United States;<sup>2</sup> and by an act of 1916 Congress authorized the President, "in his discretion, to detail to assist the Republic of Haiti such officers and enlisted men of the United States Navy and Marine Corps as may be mutually agreed upon by him and the President of Haiti."<sup>3</sup> Since 1916 the military occupation of Santo Domingo has been maintained by American marines, as a mode of enforcing Art. III of the treaty of 1907 between the United States and that republic.<sup>4</sup>

#### SUMMARY AND CONCLUSION

Under the Constitution Congress is vested with the power of raising, supporting, and equipping the military and naval forces of the United States and of making appropriations for that purpose, subject to the condition that appropriations for the army shall not extend beyond a period

<sup>1</sup> 39 Stat. at L., pt. 2, p. 1659. On this treaty see *Am. Jour. of Internat. Law*, X, 859-65 (Oct., 1916).

<sup>2</sup> *Ibid.*, 1658.

<sup>3</sup> 39 Stat. at L., 223. Congress made similar provision in 1918 for the Dominican republic. 40 Stat. at L., 437.

<sup>4</sup> P. M. Brown, "The Armed Occupation of Santo Domingo," *Am. Jour. of Internat. Law*, XI, 394-9 (Apr., 1917).



of two years.<sup>1</sup> The power of directing the movements of the armed forces, however, is lodged in the President, by virtue of his status as commander-in-chief of the army and navy. Although the power to declare war is expressly vested only in Congress, that body is not always in session, and when it becomes necessary to defend the country against sudden aggression before Congress can be assembled, the President, in his capacity of commander-in-chief, may repel invasion through the use of the armed forces without special legislative authorization.<sup>2</sup>

That the President would find occasion to conduct war-like operations of a defensive character without express legislative authorization was expected by the framers of the Constitution, who accordingly substituted "declare" for "make" in the grant of the war power to Congress, "leaving to the Executive the power to repel sudden attacks."<sup>3</sup> Apropos of the Hague Convention concerning the opening of hostilities, the American delegation to the second Hague Conference asserted that "it has been the unbroken practice of the Government of the United States for more than a century to recognize in the President, as the commander-in-chief of the constitutional land and naval forces, full power to defend the territory of the United States from invasion, and to exercise at all times and in all places the right of national self-defense."<sup>4</sup> As the Supreme Court declared in the Prize Cases, "if a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He

<sup>1</sup> Art. I, sect. 8.

<sup>2</sup> The President might also take such steps, if he deemed it necessary to do so, before Congress has acted, even though that body is in session at the time the emergency arises. In this connection it may be noted that each of the several states of the Union, although having no power to declare war against a foreign nation, may defend itself by force if actually invaded or in such imminent danger as will not admit of delay. Constitution, Art. I, sect. 10, cl. 3.

<sup>3</sup> *Journal of the Convention* (Hunt ed.), II, 188; Cf. Curtis, *Constitutional History of the U. S.*, II, 332, and Whiting, *War Powers under the Constitution* (43rd ed.), p. 39.

<sup>4</sup> G. B. Davis, "Amelioration of the Rules of War on Land," *Am. Jour. Internat. Law*, II, 66 (Jan., 1908).

does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”<sup>1</sup> This statement is undoubtedly true as a corollary of the general principle of national self-preservation, as well as by implication from the President’s constitutional powers. The question, however, has been raised whether the President may recognize a foreign war not attended by invasion of American territory and by his act produce the juridical results of a status of war, and the Prize Cases have been referred to as answering the query in the affirmative.<sup>2</sup> It should be remembered, however, that the Prize Cases were decided by a divided court (four justices, including Chief Justice Taney, dissenting), and that the statements in the majority opinion were *obiter* in so far as they applied to a foreign war. The better law, at least theoretically, would seem to be embraced in the assertion of Justice Nelson, speaking for the minority of the court, that the “President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights and thus change the country and all its citizens from a state of peace to a state of war.” Moreover, as was pointed out in the majority opinion, “a civil war is never publicly proclaimed, *eo nomine*”; and if the President had performed acts requiring legislative authorization, this was to be regarded as having been given by the act of Congress of 1861 “approving, legalizing and making valid all the acts, proclamations and orders of the President as if they had been issued and done under the previous express authority and direction of Congress.” The majority of the court did not admit that this act of Congress was necessary. As was pointed out in the dissenting opinion, however, the President, by virtue of his constitutional power to see that the laws are executed and of acts of

<sup>1</sup> 2 Black, 635. Cf. *Talbot v. Janson*, 3 Dall., 133.

<sup>2</sup> Corwin, *The President's Control of Foreign Relations*, 141-2.

Congress authorizing him under certain circumstances to call out the militia, could meet a situation arising during the recess of Congress due to foreign invasion of our territory,<sup>1</sup> or an insurrection of any considerable dimensions, since such disturbances necessarily interfere with the enforcement of federal law.<sup>2</sup> At any rate, the Prize Cases show conclusively that the question of the existence of war and of the date of its beginning is a political one, to be determined by the political department of the Government. The courts consider such determination as binding upon themselves.

The question of the relative powers of the President as commander-in-chief and of Congress over the military and naval forces of the United States was raised in the Senate in connection with the debate upon the Lodge reservation to Article X of the Covenant of the League of Nations. This reservation was to the effect that Congress, under the Constitution, "has the sole power to declare war or authorize the employment of the military or naval forces of the United States."<sup>3</sup> As was pointed out by Senator Borah, this statement, apparently intended as a mere declaration of fact, is not strictly correct.<sup>4</sup> It is, of course, true that Congress alone can make provision for raising and maintaining military and naval forces, and that it may make rules for the government and regulation of such forces. But it is not true that, after raising forces and providing for their support, Congress can restrict the discretion of the President, as commander-in-chief, in directing their movements and in otherwise disposing of them.

<sup>1</sup> Our ships on the high seas and our embassy and legation buildings abroad are technically parts of our territory.

<sup>2</sup> In *Hamilton v. McClaghry* (136 Fed., 445), however, it was held that the question as to the existence of a condition of war is within the exclusive jurisdiction of the political department of the Government, and that the Boxer uprising of 1900 in China constituted a "time of war" within the meaning of the fifty-eighth article of war, providing for the trial by military court-martial of certain offenses committed by soldiers in time of war.

<sup>3</sup> Cong. Record, March 19, 1920, p. 4899.

<sup>4</sup> See his speeches in Cong. Record, November 5, 1919, and November 10, 1919, pp. 8465, 8681 ff.

Theoretically, Congress might, indeed, impose an indirect limit on the President's powers by refusing to make further military or naval appropriations. In the present state of public opinion at home and of conditions abroad it would be politically impossible, however, for the legislative branch thus to leave the country defenseless.

As long as armed forces exist, the President, as commander-in-chief, may on occasion use them to conduct warlike operations without special legislative authorization. This is especially true of defensive operations, which are dependent not on the choice of our Government but on that of any aggressive foreign power.<sup>1</sup> Even in the absence of treaty provision or legislative authorization, the President on his own initiative may, as commander-in-chief, send military and naval forces to foreign countries to protect American lives, property, and even inchoate interests. Where there is neither treaty provision nor legislative authorization, and where no danger to American interests exists, he cannot land troops for hostile purposes or commit acts of a warlike nature without usurping his authority; but he may make naval demonstrations and dispatch warships on ostensibly peaceful missions, as in the case of the sending of the battleship *Maine* into Havana harbor. Where we have a treaty with a foreign country authorizing us to do so, the President, by virtue of his power to see that the laws (including treaties, which are a part of the supreme law of the land) are executed, may, as commander-in-chief, send military or naval forces to that country to maintain peace and order, irrespective of whether American inter-

<sup>1</sup> Cf. Whiting, *War Powers under the Constitution* (43rd ed.), 39. That Congress cannot, notwithstanding its military powers, control the action of the President as commander-in-chief was indicated by an attempt to do this in 1912 through its financial power. The attempt took the form of a proposed amendment to the Army Appropriation Bill providing that "no part of the money herein appropriated shall be used for the pay or supplies of any part of the army employed, stationed or on duty in any country or territory beyond the jurisdiction of the laws of the United States." The proviso was added, however, "that this prohibition shall not apply to cases of emergency within the discretion of the President arising at a time when the Congress is not in session." Cong. Record, August 14, 1912, vol. 48, p. 10921.

ests are directly involved. This is not war, nor necessarily a preliminary of war; rather, it is intended as a measure for the prevention of war, as was notably true in a number of instances in which the United States landed forces in Latin American countries. Such action has often been considered necessary in order to avoid armed intervention by European powers in the affairs of such countries in violation of the Monroe Doctrine. As we have seen, the peculiar relations with and interests in Latin America which are construed to give us a right of intervention, have now in several instances, *e.g.*, Cuba, Panama, and Haiti, been regularized by treaty provision.

The President has sometimes undertaken to use force for the protection of territory in Latin American countries pending its annexation to the United States under a treaty not yet approved by the Senate. The action of President Grant in sending naval forces to Santo Domingo in 1871 under such circumstances was denounced by Senator Sumner as involving an unlawful assumption by the President of the war-making power for the protection of what Sumner himself characterized as "inchoate" or "contingent" interests of the United States. The Senator's resolutions condemning the action of the President were, however, laid on the table by a vote of more than two to one.<sup>1</sup> Similar action of President Tyler with reference to Texas in 1844 was also strongly denounced in the Senate. In neither of these cases was the ratification of the pending treaty advised and consented to by the Senate, although in the case of Texas a joint resolution of annexation was eventually passed.

In view of subsequent developments, the attitude of the Senators who denounced the action of the President on these occasions seems somewhat overdrawn. As already indicated, President Roosevelt, in 1905, undertook to maintain in Santo Domingo, by the use of our naval forces, a

<sup>1</sup> Moore, *Digest of Internat. Law*, I, 278-9, and references to Cong. Globe there cited.

diplomatic situation pending action upon a treaty by the Senate, which, in fact, failed of ratification.<sup>1</sup> In 1903 he maintained a naval force in the neighborhood of Panama pending the outcome of a successful revolution therein against Colombia, and the result was ratified by the treaty of the following year with Panama in which the United States promised to guarantee and maintain the independence of that republic.<sup>2</sup> In still other instances the President has used force in Latin American countries with which we had no treaty granting such authority, either ratified or pending, and in which American interests were not directly menaced. If such action may be taken with reference to countries with which we have not even a pending treaty, it would seem to follow that the President would not be disabled by the failure of a pending treaty to receive the Senate's approval; although this would be true only in the case of those Latin American countries with which, as already pointed out, we have special and peculiar relations. The power of intervention and of police supervision which the Presidents have developed places upon them a heavy responsibility for the maintenance of peace and the adjustment of international complications.

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<sup>1</sup> This, however, was a treaty, not of annexation, but of financial supervision.

<sup>2</sup> Malloy, *Treaties*, etc., II, 1349. See C. L. Jones, *Caribbean Interests of the United States*, 202. This is an example of the use of the "big stick." The landing of forces in Latin American countries was, in several instances, justified by President Roosevelt under the doctrine of an "international police power," which is a positive interpretation of the Monroe Doctrine. See his message to Congress, *For. Rels. of U. S.*, 1904, p. xli.

## CHAPTER XXX

### THE BEGINNING OF WAR

UNDER this head we have to consider the respective powers of the President and of Congress in connection with the outbreak of such armed conflicts between the United States and foreign powers as are accompanied by a formal declaration of war on our side or, at all events, are of such a nature as properly to be denominated wars. In most countries the power to declare war is lodged in the executive, although parliamentary support is necessary for the prosecution of hostilities. The framers of our Constitution preferred, however, a different arrangement. They were establishing a representative form of government, hence they deemed it better that the power of initiating war, which so profoundly affects the lives and fortunes of the mass of the people, should be in the hands of that branch of the Government which was conceived to be most broadly representative, namely, Congress. As Madison wrote at the end of the eighteenth century, "The Constitution supposes what the history of all governments demonstrates, that the Executive is the branch of power most interested in war and most prone to it. It has accordingly, with studied care, vested the question of war in the Legislature."<sup>1</sup> The decision was influenced also by regard for the principle of separation of powers, it being deemed preferable that the declaration of war and its prosecution should be intrusted to different branches of the Government.

There was, it is true, some difference of opinion in the convention. Butler favored vesting the power of making

<sup>1</sup> *Writings* (Hunt ed.), VI, 312.

war in the President, in the confidence that he would not use it save when the nation would approve. Gerry, however, averred that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."<sup>1</sup> Mason also opposed giving the war power to the Executive on the ground that he could not be trusted with it; likewise, he opposed the suggestion of Pinckney that the Senate would be the best depository, on the ground that that body "was not so constructed as to be entitled to it."<sup>2</sup> The provision at first stood, "to make war"; but, on motion of Madison and Gerry, this was amended so as to read, "to declare war," thus "leaving to the Executive the power to repel sudden attacks." Congress was to have the power of formally changing the condition of the country from peace to war by issuing a declaration to that effect, while the President, as commander-in-chief, was to conduct wars so declared and to fend off sudden attacks by initiating defensive operations.

As is indicated in the preceding chapter, there have been many occasions upon which the President has found it necessary to use force in or against foreign countries without a formal declaration of war by Congress; and some of these actions have differed so little from actual war that, in the material sense at least, they can scarcely be distinguished from it.

#### THE POLICY OF ARMED NEUTRALITY

In order to protect our rights and interests as a neutral in the midst of war between foreign nations, without taking the extreme step of declaring war, we have at times essayed to adopt the policy of armed neutrality. This policy might, with some show of reason, be considered a form of the use of force short of war. But, as it has, in important instances, failed to avert war, it may appropriately be con-

<sup>1</sup> *Journal of the Constitutional Convention* (Hunt ed.), II, 188.

<sup>2</sup> *Ibid.*



sidered in the present connection. Such armed neutrality is, in fact, scarcely distinguishable in its incidents and effects from qualified, partial, or limited war. In 1798, during our controversy with France over neutral rights, President Adams informed Congress that he felt no longer justified in continuing the instructions to collectors of customs to restrain vessels of the United States from sailing in an armed condition.<sup>1</sup> This announcement aroused some controversy over the President's constitutional power,<sup>2</sup> but Congress subsequently passed several acts which together authorized partial hostilities against France. Among them was the act of July 9, 1798, which authorized the President to instruct the commanders of public armed vessels of the United States to capture armed French vessels, and also authorized him to issue special commissions, or letters of marque and reprisal, to the owners of private armed vessels of the United States for the same purpose.<sup>3</sup> Thus we resorted to partial hostilities and to privateering in maintaining our rights against France. But there was no formal declaration of war.

In a case arising in the Supreme Court involving the relations between the United States and France in 1799, Justice Washington distinguished between a limited or imperfect and a general or perfect war, solemnly declared. He maintained that the existing difficulty with France belonged to the former class, and that Congress did not issue a formal declaration, because that "might have constituted a perfect state of war, which was not intended by the government."<sup>4</sup> There is still room for difference of

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, I, 265.

<sup>2</sup> Cf. Madison's *Writings*, VI, 313.

<sup>3</sup> 1 Stat. at L., 578; reprinted in J. B. Scott [ed.], *The Controversy over Neutral Rights between the United States and France, 1797-1800*, 65-66. Cf. G. G. Wilson, "Limited Use of Force," *Am. Jour. of Internat. Law*, XI, 384-387 (Apr., 1917).

<sup>4</sup> *Bas v. Tingy*, 4 Dall, 37; *Talbot v. Seeman*, 1 Cranch, 1; J. B. Scott, *The Controversy over Neutral Rights Between the U. S. and France*, 110. Cf., however, the opinion of Attorney-General Lee in 1798 that there existed an "actual maritime war between the United States and France." 1 Op. Att.-Gen., 84, Aug. 21, 1798.

opinion as to whether the measures taken against France at this time shall be regarded as war or as the use of force short of war.

Again in 1917, when diplomacy had failed to secure respect for our rights by Germany, and diplomatic relations with that country had been severed, President Wilson appeared before a joint session of Congress and declared: "Since it has unhappily proved impossible to safeguard our neutral rights by diplomatic means against the unwarranted infringements they are suffering at the hands of Germany, there may be no recourse but to *armed* neutrality, which we shall know how to maintain and for which there is abundant American precedent."<sup>1</sup> To meet these circumstances, the President requested Congress to authorize him "to supply our merchant ships with defensive arms and with the means of using them and to employ any other instrumentalities or methods that may be necessary and adequate to protect our ships and our people in their legitimate and peaceful pursuits on the seas."<sup>2</sup> As showing his attitude toward the question of legal power involved, the President added: "No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers; but I prefer, in the present circumstances, not to act upon general implication. I wish to feel that the authority and the power of the Congress are behind me in whatever it may become necessary for me to do. We are jointly the servants of the people and must act together and in their spirit, so far as we can divine and interpret it."<sup>3</sup>

A bill was thereupon introduced in the House of Representatives with a view to granting the President the desired authority. It passed in that body, but failed in the Senate on account of a filibuster carried out just prior to

<sup>1</sup> Cong. Record, February 26, 1917, vol. 54, p. 4273.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

the termination of the session by constitutional limitation. It was opposed in both branches on the ground that it undertook to transfer and delegate to the President the war power of Congress.<sup>1</sup> In view of the fact, however, that the President, as commander-in-chief of the navy, could have directed our war-ships to convoy our merchant ships along the lanes of high sea travel, and to protect them against unlawful attack, the objection of unconstitutionality seems ill-founded.<sup>2</sup> That the President himself held this view is evidenced by his action in carrying out the proposed arming of merchant ships in spite of the failure of Congress to pass the bill. Armed neutrality did not in this case avert war. But it failed, not through any choice on our part, but on account of the fact that war was thrust upon us by the German Government.

#### CLASSIFICATION OF ARMED CONFLICTS

Some authorities enumerate eight foreign wars to which the United States has been a party since the adoption of the Constitution, including the difficulties with France and the Barbary states in which formal declarations of war were not issued by Congress.<sup>3</sup> Other writers are inclined to classify our conflict with France as the adoption of forcible measures short of war.<sup>4</sup> It is evident that the distinction between those conflicts which may be properly

<sup>1</sup> Cong. Record, 64th Cong., 2d sess., pp. 4637-8, 4652, 4772-3, 4878.

<sup>2</sup> The question might, however, have been raised whether the project to arm our merchant vessels did not virtually amount to privateering. The power to grant letters of marque and reprisal is, by the Constitution, specifically lodged in Congress, and in 1835 the Senate Committee on Foreign Relations was not satisfied that the power could be delegated to the President. (Moore, *Digest of Internat. Law*, VII, 127.) Privateering, it is true, was abolished by the Declaration of Paris in 1856; but the United States was not a party to this Declaration, although it has since conformed its conduct to it.

<sup>3</sup> S. E. Baldwin, "The Share of the President in a Declaration of War," *Am. Jour. of Internat. Law*, XII, 2 (Jan., 1918); cf. Moore, *Digest of Internat. Law*, VII, 168.

<sup>4</sup> Stowell and Munro, *International Cases*, II, 3-7; *Webster's Works*, IV, 163-5; and *Gray v. U. S.*, 21 Ct. Cl., 340, cited in Moore, *Digest of Internat. Law*, VII, 158.

termed wars and those which fall short of war is not sharp; some conflicts fall on the border line, so that there may be a difference of opinion as to their true nature. The landing of American troops at Vera Cruz in 1914 is not commonly considered as constituting a war, although the Mexican foreign minister handed our *chargé d'affaires* his passports with a note stating that "according to international law, the acts of the armed forces of the United States . . . must be considered as an initiation of war against Mexico."<sup>1</sup> War against Mexico, however, was not intended by our Government, the sole object being reprisals. Nor did we intend war against China when we sent an armed expedition to Peking in 1900, although that undertaking had many of the outward marks of war in the material sense, and the period was held by a lower federal court to constitute a "time of war," within the meaning of the article of war providing for the trial by military court-martial of certain offenses committed by soldiers in time of war.<sup>2</sup> As was stated by the Court of Claims in 1909, "while reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them."<sup>3</sup> Any exclusive list, therefore, of wars waged by the United States against foreign states will be somewhat arbitrary. For present purposes, it will suffice to include in such a list our conflicts with France, Tripoli, Algiers, Great Britain, Mexico, Spain, and Germany and Austria-Hungary.

#### THE PROCESS OF DECLARING WAR

It has been pointed out that there are "three stages in proceedings for declaring war by the United States. The

<sup>1</sup> *American Year Book*, 1911, p. 35.

<sup>2</sup> *Hamilton v. McClaughry*, 136 Fed., 445.

<sup>3</sup> The Schooner *Endeavor*, 44 Ct. Cl., 242, quoted by G. G. Wilson in *Am. Jour. of Internat. Law*, XI, 387 (Apr., 1917). Cf. the statement of President Wilson that the expedition into Mexico after the Columbus raid of 1916 was undertaken "in entirely friendly aid of the constituted authorities of Mexico," *Am. Jour. of Internat. Law*, X, Supp., 184 (Apr., 1916).

first comes with the doings of the President in informing Congress of the state of our relations with the power against which war may be declared. The second is the doings of Congress in making the declaration, and the third is the approval of the declaration by the President.”<sup>1</sup> We may consider each of these in turn.

The power of changing the condition of the country from peace to war by formal declaration rests, under the Constitution, with Congress. But an intelligent decision upon a policy of peace or war requires information and touch with foreign affairs and relations, such as the President, as the officer of the Government charged with the conduct of foreign intercourse, will be more likely to have than will Congress. Indeed, as our points of contact with other nations become more numerous, the President necessarily takes over, in an increasing degree, control over the determination of war or peace, in spite of the legal conferment of this power by the Constitution upon Congress.

Interesting light of an almost contemporaneous character is thrown upon the meaning to be attached to the constitutional provision concerning the declaration of war by the debates which took place in Congress in 1798 in connection with our relations with France, then closely approaching war. In March of that year, President Adams informed Congress that dispatches which he had received indicated that the objects of the mission to France—ordinarily known as the “XYZ” mission—could not be accomplished on terms compatible with the safety, honor, or essential interests of the nation. He therefore recommended that Congress adopt measures of defense and, as indicated above, informed that body that he had withdrawn the instructions to collectors to restrain vessels of the United States from sailing under arms.<sup>2</sup>

This message was regarded by many members of Con-

<sup>1</sup>S. E. Baldwin, in *Am. Jour. of Internat. Law*, XII, 10 (Jan., 1918).

<sup>2</sup>Richardson, *Mess. and Pap. of the Presidents*, I, 264-5.

gress as directly pointing to war, and it led to the introduction in the House of Representatives of two resolutions, one opposing war and the other requesting further information. The first resolution declared that "under existing circumstances, it is not expedient for the United States to resort to war against the French Republic," and that provision ought to be made by law for restricting the arming of merchant vessels, except as previously permitted.<sup>1</sup> The last-mentioned clause represented an attempt on the part of members who opposed the war to take from the President one means of engaging in warlike measures in a way which might bring on a general war.<sup>2</sup> The first clause was an attempt on the part of the same element to make an express declaration in opposition to what was deemed by many as the President's evident inclination toward a war with France. The wording of the declaration was based on the idea that Congress not only should be "the instrument to give the sound of war," as one member expressed it, but should control the whole subject.<sup>3</sup> Mr. Nicholas expressed the view that "Congress had the power over the progress of what led to war, as well as the power of declaring war, but if the President could take the measures which he had taken, with respect to arming merchant vessels, he, and not Congress, had the power of making war."<sup>4</sup>

To some it seemed superfluous, if not harmful, for Congress to make a negative declaration. One member put it thus: "So long as the Congress shall forbear to declare war, it is a sufficient expression of their sentiment that such a declaration would be inexpedient: it is the only proper expression of such a sentiment."<sup>5</sup> In a letter to Jefferson, Madison, however, while admitting that such a

<sup>1</sup> Annals of Cong., 5th Cong., cols. 1319, 1320.

<sup>2</sup> In a letter to Jefferson, Madison expressed the view that "Congress ought clearly to prohibit arming." *Writings* (Hunt ed.), VI, 313.

<sup>3</sup> Annals of Cong., 5th Cong., col. 1321.

<sup>4</sup> *Ibid.*, col. 1324.

<sup>5</sup> *Ibid.*, col. 1320.

negative declaration is ordinarily ineligible, argued that it might be proper in certain cases.<sup>1</sup> The present negative resolution, however, failed to pass. It was clearly an attempt on the part of those members of Congress who sponsored it to restrict the President's power over the beginning of war. Although a formal declaration of war was not adopted, it doubtless would have been adopted if the President had recommended it, and the failure of the negative resolution is significant as showing the strength of the President's position.

The second resolution provided "that the President be requested to communicate to this House the instructions to and dispatches from the envoys extraordinary of the United States" to France, mentioned in the President's message.<sup>2</sup> These were the famous "XYZ" papers, whose contents bore directly upon the question of peace or war which it was deemed the business of Congress to decide. Members of the House complained that they were left in the dark as to the contents of these dispatches, with the result that they lacked the information necessary to an intelligent decision. The question involved was, in principle, similar to that which arose over the request of the House that the President transmit the papers connected with the Jay Treaty with a view to assisting that body in arriving at a decision as to an appropriation for carrying the instrument into effect. In both instances the House was called upon to perform a constitutional function which it felt able to exercise intelligently only if it were put in possession of information which the President alone could supply. In

<sup>1</sup> He mentions the following cases: "1. Where nothing less than a declaration of pacific intentions from the department entrusted with the power of war, will quiet the apprehensions of the constituent body, or remove an uncertainty which subjects one part of them to the speculating arts of another. 2. Where it may be a necessary antidote to the hostile measures or language of the Executive Department. . . . 3. Where public measures or appearances may mislead another nation into distrust of the real object of them, the error ought to be corrected; and in our Government, where the question of war or peace lies with Congress, a satisfactory explanation cannot issue from any other departments." *Writings* (Hunt ed.), 317-8.

<sup>2</sup> *Annals of Cong.*, 5th Cong., col. 137<sup>a</sup>

the case of the "XYZ" papers, however, no definite obligation, in an international sense, had been created by another organ of the Government to adopt any particular course of action. In this case, moreover, when it appeared that the resolution requesting the papers had passed the House by a substantial majority,<sup>1</sup> the desired documents were promptly transmitted to both branches by the President, "omitting only some names and a few expressions descriptive of the persons."<sup>2</sup>

In the House debate some expressions were used to the effect that the body had a constitutional right to demand the papers and to require their transmission, since otherwise its constitutional power of declaring war would be rendered nugatory. The better view, however, was expressed by Mr. Gallatin, who declared that the House had no control over the President in this respect. He was in favor of acting without requesting further information, since he did not know "that it would be given, or, if given, whether it would not be in a mutilated state."<sup>3</sup>

The points involved in this controversy had been considered to some extent in the debate between Hamilton ("Pacificus") and Madison ("Helvidius") over Washington's proclamation of neutrality. Madison argued that, by virtue of its power to declare war, Congress had also the power of judging whether the United States is obliged to declare war, while the President is excluded from the right of so judging. Hamilton correctly contended, however, that, even though Congress may have such a right of judgment, it does not follow that the President "is excluded from a similar right of judgment in the execution of his own functions."<sup>4</sup> The President, moreover, occupies the strategic position in the matter. In case he declines to transmit papers demanded by Congress, there is admittedly no way of

<sup>1</sup> *Annals of Cong.*, 5th Cong., col. 1371.

<sup>2</sup> Richardson, *Mess. and Pap. of the Presidents*, I, 265.

<sup>3</sup> *Annals of Cong.*, 5th Cong., col. 1363.

<sup>4</sup> Quoted in Corwin, *President's Control of Foreign Relations*, 12, 21.



securing them, save by the laborious method of impeachment. Any attempt on the part of Congress to secure from the President full information upon which to base a decision as to declaring war is likely to encroach upon that officer's diplomatic powers, *e.g.*, those connected with his instructions to commissioners and the results of diplomatic negotiations. Whether or not the President will communicate such information lies entirely within his discretion, and will be determined in accordance with his ideas of policy and expediency. The result is that, in practice, the President, through his control of essential information, can usually manipulate the situation, if he desires, so as to secure or prevent a declaration of war by Congress.<sup>1</sup>

In the debate on the armed neutrality bill of 1917, Senator Stone, after calling attention to the disuse into which the issuance of formal declarations of war had fallen, affirmed that in order to prevent the country from being thrust into a state of actual war without any action of Congress whatever, it would be necessary for that body to take the position that "nothing can be done to inaugurate or initiate war until Congress first authorizes it."<sup>2</sup> Senator Cummings argued in the same strain when he said that "it is for Congress to determine the character of an act and to declare to the world whether the act is sufficient to bring on war."<sup>3</sup> These contentions were doubtless in accordance with the constitutional theory of Congressional participation in war-making. But they ignored the practical aspects of the matter—aspects which were duly taken note of by Senator Lodge, when, in the same debate, he declared that "the President, under his constitutional powers, can, if he choose, get the country into war. As Mr. Webster said on one famous occasion, 'nobody declared the Mexican

<sup>1</sup> Cf. Madison's statement in a letter to Jefferson in 1798 that measures "may be taken by the Executive that will end in war, contrary to the wish of the body which alone can declare it." *Writings* (Hunt ed.), VI, 314.

<sup>2</sup> Cong. Record, March 3, 1917, vol. 54, p. 4879, citing *Tucker on the Constitution*, II, 577.

<sup>3</sup> *Ibid.*, p. 4911.

War; Mr. Polk made it.' The President can do that without any resolution of Congress."<sup>1</sup>

Warlike operations on a considerable scale are possible, as we have seen, without a declaration of war by Congress, and, indeed, without any specific action whatever by that body, as in the case of the Boxer expedition of 1900. The only way in which Congress could prevent operations of this sort would be by failing to make any financial provision for military or naval armament, which, under existing conditions, it cannot afford to do. As long as such armament exists, the President, by virtue of his position as commander-in-chief of the army and navy, can on occasion use it to conduct operations which may result in war. The United States may be attacked; and it then becomes the duty of the President to recognize the state of war and to ward off invasion without waiting for special legislative authorization. Practically, the President has the power to bring on a war which may colorably be denominated defensive but which in reality is aggressive. The distinction between defensive and offensive warfare is, in fact, rather illusory.

Although there was much opposition, both in Congress and in the country, to the Mexican War—the war which Webster declared that President Polk made—nevertheless it would seem that, technically, the President was acting within his legal and constitutional powers in the measures which he took in the early stages of that conflict. Two battles, Palo Alto and Resaca de la Palma, were fought in May, 1846, before Congress declared the existence of a state of war. They took place on territory north of the Rio Grande which Mexico claimed. By act of the Texan Congress, passed in 1836, this territory, however, belonged to that state, which in 1845 was incorporated in the United States. Furthermore, Congress, in the last-mentioned year, gave its implied sanction to the theory that our southwest-

<sup>1</sup> Cong. Record, March 2, 1917, p. 4751.

ern border was the Rio Grande by passing an act extending the revenue laws of the United States over the territory north of that river. Under these circumstances, it would seem fairly clear that the President was not acting *ultra vires* in defending the territory in dispute from invasion, and that he might well have been accused of neglect of duty if he had not done so. Nevertheless, it is doubtless true that he was not averse to war; he may even be regarded as having manipulated the situation so as to bring on hostilities.<sup>1</sup>

Not only through his military powers, but also through the exercise of his diplomatic functions, the President may bring about a situation leading directly to war. Thus in the conduct of diplomatic negotiations he may insist not only firmly but aggressively upon what he conceives to be our national rights, as in the case of the disputed interpretation of a treaty, and may decline to submit the dispute to arbitration. He may bring on a diplomatic *impasse* by sending an ultimatum to a foreign government with which we are in disagreement, and he may sever diplomatic relations with such a government altogether, a step which is a frequent preliminary of war.<sup>2</sup> Moreover, through his power to receive diplomatic envoys he may recognize the belligerency or independence of the revolting colonies of a government with which we are at peace, thus furnishing to that government a *casus belli*. And if, through any of these means, he precipitates hostilities with another power, Congress cannot afford to refuse support, even though it feels that a less aggressive diplomatic policy would have averted the conflict altogether. In the case of the Mexican War, as previously indicated, the President's policy was vigorously

<sup>1</sup> For the debate in Congress on the President's policy, see Benton, *Abridgment*, XV, 489-504, and compare Reeves, *American Diplomacy under Tyler and Polk*, 272-298.

<sup>2</sup> Thus, diplomatic intercourse with Mexico was suspended for more than a year and with Germany for about two months before the outbreak of war with those countries.

opposed in Congress, especially by the Whigs; but very few members withheld their support from its prosecution.<sup>1</sup>

By virtue of the President's constitutional authority to convey to Congress information on the state of the Union and to recommend to that body the consideration of such measures as he shall judge necessary and expedient, it becomes his duty to recommend that Congress take appropriate action whenever our relations with another power become such that diplomatic means are no longer adequate to maintain our international rights and national honor. If during a recess of Congress the situation becomes so acute as not to admit of delay, it is his duty to call a special session; although this has been found necessary only in the case of the war with Germany.

The extreme view of the extent of Congressional power over the beginning of war was thus expressed by Senator Bacon in his debate with Senator Spooner in 1906: "The President not only cannot declare war, and it is not only conferred in terms upon Congress, but even if the President should be opposed to a proposed war, two-thirds of each branch can declare war. It would not require his approval. There is the most important of all foreign relations. It does not belong to the President."<sup>2</sup>

This is theoretically true, but the practical facts are diametrically the opposite. It may be accepted as an established "convention" of the Constitution that, although Congress has full legal power to declare war without regard to the President's wishes, and may even pass such declaration over his veto by a two-thirds vote as in the case of any other act, nevertheless it will not pass such an act in the first place unless assured of the support and approval of the President as indicated by his express or virtual recom-

<sup>1</sup>On January 3, 1848, however, a joint resolution passed the House of Representatives by the close vote of 85 to 81 declaring that the Mexican War had been "unnecessarily and unconstitutionally begun by the President." Cong. Globe, 30th Cong., 1st sess., p. 95. An attempt on February 14 of the same year to rescind this resolution was defeated by 105 to 94. *Ibid.*, 344.

<sup>2</sup>Quoted in Corwin, *President's Control of Foreign Relations*, 191.

mentation that such a declaration be issued. The President has control of diplomatic intercourse and of the sources of official information regarding foreign relations. Congress has nothing of the sort. Moreover, Congress is dependent upon the President, as commander-in-chief, to prosecute any war that it may declare. Hence, the power of that body to declare war can be correctly appraised only when considered in connection with the President's powers touching the beginning of war. These latter powers are both positive and negative. Positively, the President may, through the exercise of his diplomatic and executive powers, bring on a situation such that Congress, even against its wishes, will be practically compelled to support his war policy. Negatively, he may prevent a declaration of war by Congress by declining to recommend or approve it.

On the other hand, it is true that Congress, if inclined to war, may bring such pressure to bear on a President desirous of avoiding war as practically to force his hand. Thus, prior to our entrance into the War of 1812 with Great Britain a group of men in Congress, known as the "war hawks," agitated in favor of war, and as a result of their efforts acts were passed tending to put the country in a state of preparation for the contemplated hostilities.<sup>1</sup> President Madison was averse to war, although resentful of the aggressive acts of Great Britain against our ships and commerce. On April 1, 1812, he recommended to Congress that a general embargo be laid on all vessels then in port, and two months later he sent in a message enumerating our grievances.<sup>2</sup> The tone of the message suggested war, although the President did not expressly recommend a declaration of war, but rather only that Congress give its

<sup>1</sup> If, as has often been argued, the mere existence of large armaments is a potent cause of war, then, to that extent, Congress may greatly assist in bringing on war by providing such armament.

<sup>2</sup> With regard to Congressional pressure on President Madison, it is to be remembered that this could be the more easily exerted in 1812, since the President was dependent for his renomination upon the action of the Congressional caucus.

consideration to the question. "Whether," he said, "the United States shall continue passive under these . . . accumulating wrongs" or oppose "force to force in defense of their national rights . . . is a solemn question which the Constitution wisely confides to the legislative department of the Government."<sup>1</sup> In other cases, however, where Congress has formally declared war, the President has taken a more positive stand and has expressly recommended such a declaration. It may be said, therefore, that Congress has never declared war except in pursuance of the express or implied recommendation of the President, and with the assurance of his support and approval. It is not to be inferred, however, that the constitutional "convention" whereby the President takes the initiative in recommending a declaration of war has deprived Congress of all judgment and discretion in the matter, or should be permitted to do so.

In the debate on the armed neutrality bill of 1917 Senator Stone declared that "Congress only can constitutionally pass upon the sufficiency of a cause of war."<sup>2</sup> However true this may be from the theoretical point of view, the practical fact is that the President, through his initiative in recommending war, passes in the first instance upon the sufficiency of the cause, subject to the approval of Congress. Usually the causes of war are well known to the public; and of course the President and Congress require the support of public opinion in such an emergency as may lead to war. The President, however, as we have seen, is in control of the sources of official information and may have facts in his possession which are not generally known. It is customary for him, especially when he is in harmony politically with the majority of Congress, to keep that body, or at least the chairmen of the Committees on Foreign Relations and Foreign Affairs, informed of any

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, I, 504-5.

<sup>2</sup> Cong. Record, March 3, 1917, vol. 54, p. 4880.

developments of a threatening nature which may require the action of Congress. When the moment arrives at which he deems that the resources of diplomacy in settling an international difference have been exhausted and that the peace and the honor of the country cannot both be longer preserved, it is his duty to transmit to Congress such information regarding the state of our foreign relations as may enable that body to form an intelligent judgment upon the nature of our grievances and their sufficiency as ground for a declaration of war.

#### THE SPECIFICATION OF CAUSES

It has been customary for Presidents to inform Congress concerning developments of a threatening nature, not only in the final message recommending a declaration of war, but also during the preliminary stages of the controversy. Thus on March 9, 1812, more than three months before the actual declaration of war, President Madison communicated to Congress certain documents tending to show that Great Britain, while professing friendship for us through her public minister at Washington, was maintaining a secret agent in this country to foment disaffection toward the constituted authorities.<sup>1</sup> Again, on April 19, 1916, almost a year before Congress declared a state of war with Germany, President Wilson delivered an address before the two houses in which he recounted the notorious submarine outrages for which Germany was responsible, notably the *Sussex* affair, and informed Congress of his intention to sever diplomatic relations with the Imperial Government altogether unless it promised and effected an immediate abandonment of its methods of warfare. More than a month, also, before the declaration, Congress—as well as the world at large—was informed by the State Department of the contents of the astonishing Zimmermann note, pro-

<sup>1</sup> Richardson, *Mess. and Pap. of the Presidents*, I, 498.

posing an alliance of Germany, Mexico, and Japan against the United States.

The official statement of the causes of war, however, is usually found in the message in which the President recommends to Congress the passage of a formal declaration. Thus in his address to Congress on April 2, 1917, President Wilson recounted the grievances of the United States against Germany—the sinking of American ships, the destruction of American lives, the sending of spies and intriguers among us, and other hostile acts. In addition to this enumeration, he spoke of certain great objects for which we should fight, *e.g.*, “the rights of nations great and small and the privileges of men everywhere to choose their way of life and of obedience,” and “to make the world safe for democracy.” Thus, in addition to defending our own international rights, which had been violated by Germany, we were to exert our might as the champion of humanity and of the rights of men everywhere. This was a large undertaking, and although the President assumed to speak for the Government and for the entire nation, Congress did not go so far. The joint resolution of April 6, 1917, passed in pursuance of the President’s recommendation and declaring the existence of a state of war with Germany, provided merely that “whereas the Imperial German Government has committed repeated acts of war against the Government and people of the United States: therefore, be it resolved, that the state of war between the United States and Germany which has thus been thrust upon the United States is hereby formally declared,” etc.<sup>1</sup> Nothing was said about fighting for democracy or the rights of humanity. It may be noted also that the report of the House Committee on Foreign Affairs, although enumerating a long list of grievances against Germany, did not base its recommendation on the broader reasons assigned by

<sup>1</sup> 40 U. S. Stat. at L., 1. The joint resolution of December 7, 1917, declaring a state of war with Austria-Hungary used substantially the same phraseology. 40 Stat. at L., 429.



the President.<sup>1</sup> It may be argued that Congress gave its tacit consent to these broader reasons. It hardly seems, however, that it was necessarily committed to them. At all events, at a time when undivided counsels and the utmost coöperation were eminently desirable, it neither affirmed nor denied them.<sup>2</sup>

The issuance of a formal declaration of war has not commonly been considered necessary in international law, and in practice many wars have been begun without a declaration. Under a provision of the Hague Convention of 1907, however, which the United States ratified, it was agreed that hostilities "must not commence without previous and explicit warning in the form either of a reasoned (*motivée*) declaration of war or of an ultimatum with conditional declaration of war."<sup>3</sup> In the two instances of a declaration of war by Congress since the ratification of the Hague Convention, the statement of reasons contained in the formal declaration is so general as hardly to comply, apparently, with these requirements. In both cases, however, war had already been thrust upon us by the Central Powers, so that no element of surprise was involved; and, in view of the statement of facts in the President's address and in the report of the Congressional Committee, no further elaboration in the formal declaration seemed neces-

<sup>1</sup>See synopsis of this report in *Am. Jour. of Internat. Law*, XI, 623-6 (July, 1917).

<sup>2</sup>In regard to the grounds upon which Congress declared war, compare the following colloquy which occurred in the Senate on May 13, 1920:

"MR. BRANDEGEE. Instead of entering the war on broad principles of altruism and of service to humanity, were we not month after month alleged to be waiting for the Germans to perform an overt act against us? Was not that the daily suggestion in the newspapers that at last, perhaps, an overt act would be committed?"

"MR. THOMAS. That is absolutely true. It was the attitude of my party, whose declarations at St. Louis were to that effect, and while in connection therewith we announced our purposes and our lofty intentions toward all the world, including our enemies, the fact remains that the people of the United States responded to the war because of the outrages inflicted upon their fellow citizens, which demonstrated the need for war if we were to preserve our country from a foreign invader, sure to come, once he had broken down the barriers of an intervening ocean." Cong. Record, May 13, 1920, p. 7590.

<sup>3</sup>J. B. Scott, *Texts of the Peace Conferences at the Hague*, 199.

sary. In declarations of war issued prior to the adoption of the Hague Convention, Congress was usually even more reticent concerning the precise reasons for the action taken.<sup>1</sup> The joint resolution of April 20, 1898, however, although in form an ultimatum demanding, among other things, the withdrawal of Spain from Cuba, was virtually a declaration of war, and it contained in its preamble a reference to the "abhorrent conditions" existing in Cuba, "culminating in the destruction of a United States battleship [*Maine*] with 266 of its officers and crew and cannot be longer endured, as has been set forth by the President in his message to Congress of April 11th, upon which the action of Congress was invited."<sup>2</sup> The formal declaration embodied in an act of April 25th, merely declared the existence of a state of war since the 21st, inclusive, without specifying any farther reasons or causes.<sup>3</sup> Meanwhile, on the 22nd, the President had issued a proclamation declaring a blockade of the northern coast of Cuba,<sup>4</sup> which may be regarded as virtually a Presidential declaration of war, issued prior to the formal declaration by Congress.

The Hague Convention of 1907, quoted above, represented an attempt of the treaty power to exercise some control over the war power. Although as a party to that convention the United States assumed an obligation, in an international sense, to comply with its terms, Congress is not thereby bound, in a constitutional sense, to state the reasons for a declaration of war; in conferring on Congress the power to declare war, the Constitution does not require that the declaration shall be accompanied by reasons.<sup>5</sup> It is a fair inference from the Constitution's language that

<sup>1</sup>See Act of June 18, 1812, 2 Stat. at L., 755; act of May 13, 1846, 9 *ibid.*, 9; act of April 25, 1898, 30 *ibid.*, 364.

<sup>2</sup>30 U. S. Stat. at L., 738.

<sup>3</sup>*Ibid.*, 364.

<sup>4</sup>*Ibid.*, 1769.

<sup>5</sup>It is true that international law, which requires that treaties duly made shall be faithfully observed, has been held to be to some extent a part of our law (*The Paquete Habana*, 175 U. S., 677). But this would hardly be held to be so far true as to limit the constitutional discretion of Congress.

reasons may be stated in the declaration. But whether this shall be done is, constitutionally, for Congress to determine, and this discretion cannot be taken away or restricted by treaty. The American delegation to the Hague Conference pointed out that Congress, under the Constitution, has exclusive power to declare war, and that such power is "not susceptible of regulation or modification by law or treaty,"<sup>1</sup> although no express reservation to this effect was included by the United States in the act of ratification. Certain articles of the Covenant of the League of Nations, if ratified by the United States, might also place this country, in an international sense, under an obligation to go to war in case certain circumstances arose. In the constitutional sense, however, Congress would not thereby be obliged to declare war, since the treaty power is incapable of limiting that body's constitutional discretion in the matter.

Congress has uniformly worded its declarations of war in such a way as to imply that war already existed at the time of the issuance of the declaration, rather than that it was to begin upon such issuance. This is notably illustrated in the declaration of war against Mexico, which was entitled "an act providing for the prosecution of the existing war" between the United States and Mexico, and which, in a preamble, recited that "by the act of the Republic of Mexico, a state of war exists between that Government and the United States."<sup>2</sup> Speaking strictly, this action might be more properly characterized as a Congressional recognition of a state of war than as a formal declaration of war. In fact, as Judge Baldwin points out, a motion in the House of Representatives for a declaration of war was rejected by a large majority.<sup>3</sup> It was, however, possible to muster a majority to support the President in a war already going on, even though many members believed that the conflict had been begun by the President while acting in

<sup>1</sup> *Am. Jour. of Internat. Law*, II, 65.

<sup>2</sup> 9 U. S. Stat. at L., 9.

<sup>3</sup> *Am. Jour. of Internat. Law*, XII, 2.

excess of his powers. A resolution to this latter effect was, as we have seen, adopted by the House during the next session.<sup>1</sup>

In the case of our wars with Tripoli and Algiers, there were also Congressional recognitions of a state of war, although, as already indicated, no formal declarations of war were issued. In 1801 Tripoli declared war against the United States, and President Jefferson, as we have seen, sent a small squadron of frigates into the Mediterranean, without Congressional authorization, with orders to protect our commerce against the threatened attack.<sup>2</sup> On February 6, 1802, Congress passed an act which, after reciting that "the regency of Tripoli, on the coast of Barbary, has commenced a predatory warfare against the United States," provided that "it shall be lawful for the President to instruct the commanders of the armed vessels of the United States to subdue, seize and make prize of all vessels, goods and effects belonging to the Bey of Tripoli, or to his subjects . . . and also cause to be done all such other acts of precaution or hostility as the state of war will justify and may in his opinion require."<sup>3</sup> The act also authorized privateering, or the granting of letters of marque and reprisal to owners of private armed vessels. An act of March 3, 1815, with reference to the Bey of Algiers was of a similar tenor.<sup>4</sup> As Secretary Fish later pointed out, these measures constituted virtual declarations of war.<sup>5</sup>

#### PRESIDENTIAL APPROVAL OF DECLARATIONS OF WAR

The final stage in the process of declaring war, as in making a treaty, is normally in the hands of the President. The Congressional declaration is sometimes in the form of

<sup>1</sup> Cong. Globe, 30th Cong., 1st sess., Jan. 3, 1848, p. 95.

<sup>2</sup> Moore, *Digest of Internat. Law*, VII, 162.

<sup>3</sup> 2 Stat. at L., 129.

<sup>4</sup> 3 Stat. at L., 230.

<sup>5</sup> Moore, *Digest of Internat. Law*, VII, 168.

an act and sometimes in that of a joint resolution. But in either case it is subject to the President's power to approve or to veto, as is other legislation. The President has, however, never exercised his power of veto in the case of a declaration of war, and it is hardly probable that he will find occasion to do so, at all events as long as Congress continues the policy of not adopting a declaration of war except upon the President's recommendation. As in the case of other bills, the President cannot veto a part of a declaration of war, but must approve or veto the whole. If the causes of war as stated in the proposed act or joint resolution are decidedly at variance with the Executive's views, he might, therefore, conceivably be led to impose a veto, even though he had recommended a declaration. But he would hardly be inclined to quarrel over a difference of opinion of this sort, since it is the result that he is mainly interested in, and since, once the declaration is issued, his powers are the same without regard to the statement of causes by Congress.

When a declaration of war has been signed and approved, it is not necessary for the President to notify the enemy government of that fact. Diplomatic relations with that government have usually already been severed. He may, however, notify neutrals; indeed, under the Hague Convention relative to the opening of hostilities, belligerents are required to notify neutrals promptly at the outbreak of war, and the war has no effect so far as they are concerned until the receipt of notification.<sup>1</sup> As the organ of communication with foreign governments, the President naturally transmits such notification.

A declaration of war by Congress fundamentally affects the rights and duties of the citizens of the United States. There is no constitutional or legal requirement, however, that any special notification shall be given them, other than that which they receive in the case of other acts of Con-

<sup>1</sup> Malloy, *Treaties*, etc., 2266.

gress. But, on account of the importance of an outbreak of war, the President usually notifies citizens by a formal proclamation,<sup>1</sup> and he may, in a similar manner, notify alien residents of the country as to their rights and duties.<sup>2</sup>

The prosecution of war, once it is declared, is almost entirely under the control of the President, subject to the necessity of securing the financial support of Congress. The latter body cannot, through its military powers, take the conduct of the war and the direction of the forces out of the President's hands. It can, of course, withhold appropriations. But it is doubtful whether it can indirectly control the President's power as commander-in-chief to direct the movement of the forces through provisions in appropriation bills making funds available for the support of the army only on condition that it is employed in a certain way or upon certain territory.<sup>3</sup> At any rate, after war has been declared against a particular country, the President, in the absence of Congressional prohibition, may send troops to any part of the world if, in his judgment, such action will serve any useful purpose in connection with the prosecution of the war against the country which has been the object of the declaration. Thus during the European war President Wilson sent troops to Russia, although we were not at war with that power.<sup>4</sup>

<sup>1</sup> See, for example, President Madison's proclamation of June 19, 1812; Richardson, *op. cit.*, I, 512.

<sup>2</sup> See President Wilson's proclamation of April 6, 1917, reprinted in *Am. Jour. of Internat. Law*, XI, supp. p. 152-6 (July, 1917). The act of Congress of July 6, 1793, relating to the removal of alien enemies apparently assumes that the President will issue such a proclamation. U. S. Revised Statutes, sect. 4067; 1 Stat. at L., 577.

<sup>3</sup> Cf. a proposed amendment to the army appropriation bill of 1912 to this effect, Cong. Record, August 14, 1912, vol. 48, p. 10921. See also the debate with regard to the respective control of the President and Congress over the army, Cong. Record, April 16, 1920, vol. 59, pp. 6206-8.

<sup>4</sup> During the sixty-sixth Congress a resolution was introduced by Representative Mason, of Illinois, directing the President to withdraw our troops from Europe and Siberia. But the House Committee on Military Affairs, after investigating the constitutional questions involved, decided to take no action on the resolution. Cong. Record, April 16, 1920, vol. 59, p. 6207; *ibid.*, p. 6652: See also the message of the President in response to a Senate resolution regarding the armed forces in Siberia, July 25, 1919. Sen. doc. 60, 66th Cong., 1st sess.

Whether Congress can declare war and then compel an unwilling President, by threat of impeachment, to exercise his powers as commander-in-chief of the army and navy in the prosecution of the conflict, is a question which has never arisen in a practical form, although a somewhat analogous problem presented itself in connection with the efforts of Congress to compel the reluctant President Johnson to enforce the reconstruction acts providing for military government of the ex-Confederate states. Such a question can hardly arise in connection with a foreign war so long as Congress maintains its well-established policy of not declaring war except upon the President's recommendation.

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## CHAPTER XXXI

### THE TERMINATION OF WAR

#### THE CESSATION OF HOSTILITIES

THE termination of war must, at the outset, be distinguished from the mere cessation of hostilities or actual combat. As an eminent writer has said, war is "not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed."<sup>1</sup> Similarly, the status of war may continue, notwithstanding that actual hostilities have ceased, until terminated in some way recognized by international law as sufficient for that purpose. Actual hostilities are usually terminated by the signing of an armistice or a capitulation, which may take the form of a protocol, or preliminary agreement, regulating the relations between the belligerents until the definitive treaty of peace shall have been signed and ratified.

There is no question that the President has power to bring about a suspension of hostilities on his sole authority. For example, actual hostilities were suspended in the Spanish-American War by the protocol of August 12, 1898 (which was not submitted to the Senate), and by Presidential proclamation of the same date.<sup>2</sup> But, as the Supreme Court pointed out, "a state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. 'A truce or suspension of arms,' says Kent, 'does not terminate the war, but it is one of the *commercium belli* which suspends its operations. . . . At the expiration of

<sup>1</sup> Moore's *Digest of Int. Law*, VII, 153.

<sup>2</sup> 30 Stat. at L., 1780.



the truce hostilities may recommence without any fresh declaration of war.'"<sup>1</sup> The Attorney-General of the United States took the same view, declaring that "notwithstanding the signing of the protocol and the suspension of hostilities, a state of war between this country and Spain still exists. Peace has not been declared and cannot be declared except in pursuance of the negotiations between the peace commissioners authorized by the protocol."<sup>2</sup> Moreover, a recognition of the continuation of the war in spite of the suspension of hostilities and the signing of the protocol was expressed in the definitive treaty of peace which, in the preamble, mentioned the desire of the two parties "to end the war *now existing* between the two countries."<sup>3</sup>

The principle thus upheld by the Supreme Court, by the Attorney-General, and by the treaty-making authority would seem to be too well established to be questioned. Nevertheless, during the prolonged delay which followed the armistices with Germany and Austria-Hungary in November, 1918, arising from the failure of the President and Senate to agree upon the terms of a definitive treaty, there was some doubt whether our status after the suspension of hostilities was one of war or one of peace. Diplomatic relations with the Central Powers continued severed, but commercial relations with Germany were to some extent resumed.<sup>4</sup> In transmitting the terms of the armistice to Congress on November 11, 1918, President Wilson made the statement that "the war thus comes to an end, for having accepted these terms of the armistice it will be impossible for the German command to renew it." He, however, could hardly have meant that the war had been legally terminated. For practical purposes, actual warfare by the Central

<sup>1</sup> *Hijo v. United States*, 194 U. S., 315, at p. 323.

<sup>2</sup> 22 *Op. U. S. Atty.-Gen.*, 191. (Aug. 24, 1898). For qualification of the latter part of the Attorney-General's statement, see below, p. 594.

<sup>3</sup> Malloy, *Treaties, etc.*, II, 1690.

<sup>4</sup> Limited intercourse with the enemy may be permitted, even during hostilities, by act of Congress prescribing the conditions under which it may be carried on. *Hamilton v. Dillin*, 21 Wall., 73.

Powers was at an end; but a state of war, as he well knew, still existed.

Curiously, however, the declaration was construed by a lower federal court as equivalent to an official proclamation of the end of the war. The question before the court involved the construction of a provision of a measure passed by Congress in 1917 making certain acts criminal if committed "during the present war." The court declined to enforce the penalty prescribed, on the ground that the war had ended upon the announcement of the President.<sup>1</sup>

This, however, does not seem to have been a well-considered decision. Even if the President's statement was intended as an official proclamation of the legal end of the war, it is somewhat doubtful whether that official could thus, by his sole act, upon the mere signing of the armistice, bring the war to a legal termination. The Supreme Court seems to have held that the Civil War was ended in different states on different dates by Presidential proclamation.<sup>2</sup> It is not clear that if Congress had, by act or joint resolution, adopted a different date as the end of the Civil War from that mentioned in the President's proclamation, the court would not have followed the determination of Congress rather than that of the President. It, however, continued a certain rate of pay to soldiers in the army "for three years after the close of the rebellion, as announced by the President" in his proclamation,<sup>3</sup> thereby adopting the date which the President had fixed; and in other cases than the one cited the Supreme Court seems to take the actions of both the President and Congress into consideration in determining the date at which the Civil War ended.<sup>4</sup>

<sup>1</sup> U. S. v. Hicks, 256 Fed., 707 (1919).

<sup>2</sup> The *Protector*, 12 Wall., 700; 14 Stat. at L., 811, 814.

<sup>3</sup> 14 Stat. at L., 422.

<sup>4</sup> U. S. v. Anderson, 9 Wall., 56, 70; *McElrath v. U. S.*, 102 U. S., 438; *Lamar v. Browne*, 92 U. S., 187. In the *Anderson* case the court said: "As Congress, in its legislation for the army has determined that the Rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it."

Even though it should be held that the proclamation of the President alone was sufficient to terminate the Civil War, it is to be remembered that that war, although partaking in some respects of the characteristics of a war between independent states, was fundamentally a contest for the suppression of a domestic insurrection, ending in the overthrow of the insurrectionary government. Hence the method to be pursued in determining the date of its conclusion might be different from that to be followed in the case of a foreign war in which the foreign belligerent still has a government in existence at the termination of hostilities. At all events, as indicated above, in the case of the armistices with the Central Powers the President's announcement to Congress is not to be regarded as an official proclamation of the legal termination of the war.

Congress, indeed, gave abundant evidence that it did not consider the signing of the armistices of 1918 and the accompanying announcement by the President to have brought the war to a legal termination. Thus, after the armistices, Congress passed, and the President approved, the War-time Prohibition Act, which made illegal the sale of distilled spirits for beverage purposes "after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President."<sup>1</sup> The validity of this act was attacked in the Supreme Court on the ground, among others, that demobilization had been effected, that the war had been concluded, and that thereby the war emergency upon which the operation of the measure had been predicated was removed. The court, however, denied the contention and upheld the act's validity and continued operation. "In the absence," it said, "of specific provisions to the contrary the period of war has been held to extend to the ratification of the Treaty of Peace or the

<sup>1</sup> 40 Stat. at L., 1045, 1046.

proclamation of peace. . . . 'Conclusion of the war' clearly did not mean cessation of hostilities, because the act was approved ten days after hostilities had ceased upon the signing of the armistice. Nor may we assume that Congress intended by that phrase to designate the date when the Treaty of Peace should be signed at Versailles or elsewhere by German and American representatives, since by the Constitution a treaty is only a proposal until approved by the Senate." The court also held that the President's statement that "the war thus comes to an end" was meant in a popular sense and not as an official proclamation of the war's termination.<sup>1</sup>

Numerous other acts passed during the war provided that they should remain in force until the termination of the war or until varying lengths of time thereafter. Thus in the Trading with the Enemy Act of 1917 it was provided that "the words 'end of the war' as used herein shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this act."<sup>2</sup> Corresponding provisions of other war-time measures agree with this one in indicating that Congress expected the war to end normally with a treaty of peace, yet apparently considered that it might be terminated at a prior date by Presidential proclamation. It is not to be inferred, however, that Congress necessarily intended to intimate that a foreign war could be terminated by mere Presidential proclamation without a treaty of peace. The actions mentioned merely determined the period during which certain pieces of legislation should remain in force, and had no direct bearing on the termination of the war in an international sense.

<sup>1</sup> *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U. S., 146.

<sup>2</sup> 40 Stat. at L., 412.

## TERMINATION BY TREATY OF PEACE

The normal and usual method of ending war between nations is a formal treaty of peace. The wars in which the United States has been engaged have been almost invariably terminated in this way. In the case of the Spanish-American War, as indicated above, the definitive treaty of peace was preceded by a preliminary agreement, which also included the armistice, providing for the suspension of hostilities. In the cases of the War of 1812 and the Mexican War there was no armistice or preliminary agreement, and the definitive treaty of peace was signed while hostilities were still in progress. Even in the cases of the wars with the Barbary states, in which, as we have seen, no formal declarations of war were issued by the United States, treaties of peace were negotiated. The warlike operations between the United States and France in 1798 did not constitute a full-fledged war, and the treaty of 1800 by which amicable relations between the two countries were restored was not, speaking strictly, a treaty of peace. Most of the treaties of peace to which the United States has been a party mention in the preamble the desire of the parties to end the war existing between them. The French treaty of 1800, however, merely speaks of the desire of the parties "to terminate the differences" which have arisen between them.<sup>1</sup>

While it is commonly recognized that a treaty of peace is the normal method of terminating an international war, the question may be raised whether it is the only method which the United States can employ. Good authorities have sometimes declared to this effect. Thus in the course of his opinion in the case of *Ware v. Hylton*, Justice Chase said: "A war between two nations can only be concluded by treaty."<sup>2</sup> Again, Senator Lodge, chairman of the foreign

<sup>1</sup> Malloy, *Treaties*, etc., I, 496.

<sup>2</sup> 3 Dall., 236.

relations committee, said on the floor of Congress: "Peace can be made only by the President and Senate."<sup>1</sup> These statements, however, were *obiter* and cannot be accepted as conclusive. Merely because all of the foreign wars in which the United States has been engaged hitherto have been ended by treaty, it does not follow that there is no other possible method.

Three ways are commonly recognized in international law in which war may be terminated. A recent writer, in beginning a treatise on the subject, states them as follows: "(1) by a mere cessation of hostilities on both sides, without any definite understanding supervening; (2) by the conquest and subjugation of one of the contending parties by the other, so that the former is reduced to impotence and submission; (3) by a mutual arrangement embodied in a treaty of peace, whether the honors of war be equal or unequal."<sup>2</sup>

#### TERMINATION BY CONQUEST OR CESSATION OF HOSTILITIES

It has sometimes been questioned whether the United States is empowered to terminate war by the conquest and subjugation of the enemy. The doubt is based upon a statement by Chief Justice Taney in the case of *Fleming v. Page* in which he said: "The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandisement. . . . A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country."<sup>3</sup> In the same opinion, however, the Chief Justice admits that, by the laws and usages of nations.

<sup>1</sup> Cong. Record, April 21, 1914, vol. 51, p. 6965.

<sup>2</sup> Coleman Phillips, *Termination of War and Treaties of Peace*, 3.

<sup>3</sup> 9 How., 603, 614.

conquest is a valid title; and it has been recognized by the Supreme Court that the United States has all powers in international relations that other sovereign and independent nations have.<sup>1</sup> Certainly the courts would not interfere if the United States should prosecute a duly declared foreign war to the extent of subjugating the enemy and overthrowing his government.<sup>2</sup>

We have sometimes taken the ground, furthermore, that a war has been terminated by a mere cessation of hostilities. In 1868, when hostilities between Spain and Peru had ceased for several years without a treaty of peace, and when the United States offered to sell some warships to Peru, Spain protested on the ground that such action would violate our neutrality, since there was still a status of war. Secretary Seward, however, denied the Spanish contention, on the ground that the war had ended. "It is certain," he said, "that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made."<sup>3</sup>

In case the United States should be a party to a war resulting in the complete subjugation of the enemy and the overthrow of his government, or in the cessation of hostilities for a sufficient length of time to indicate that there was no intention of renewing them, there would be no formal treaty of peace, and the question would arise as to where, in our Government, the power to declare peace resides. When war is ended by treaty, the treaty is primarily a contract or bargain between the powers concerned, and is recognized as binding in international law if no duress has been exercised against the negotiators. Furthermore, in the United States a treaty is a part of the supreme law of the land, and is therefore a legal method

<sup>1</sup> *Fong Yue Ting v. U. S.*, 149 U. S., 698.

<sup>2</sup> *Cf. Luther v. Borden*, 7 How., 1.

<sup>3</sup> *Dip. Cor.* 1868, II, 32, quoted in Moore, *Digest of Internat. Law*, VII, 336.

of ending war. Subjugation of the enemy and long cessation of hostilities, however, are facts and not laws, although legal inferences and conclusions may be built upon them. The question is, What branch or authority in our Government is competent to establish the legal inference that, as the result of such facts, the war is ended and peace is restored?

The Constitution contains no specific grant of power to any branch of the Government to make peace. The matter came up for discussion, however, in the Philadelphia convention on August 17, 1787, in connection with the power to make war. Pinckney was in favor of vesting the power to make war in the Senate and remarked that "it would be singular for one authority to make war and another peace," thus indicating his belief that the power to make treaties, which at that stage in the proceedings was vested in the Senate alone, included the power to make peace.<sup>1</sup> This view was held also by Ellsworth, who declared that "there is a material difference between the cases of making war and making peace. It should be more easy to get out of war than into it. War also is a simple and overt declaration, peace attended with intricate and secret negotiations." Mason also was for "clogging rather than facilitating war; but for facilitating peace." When, therefore, it was moved to add "and peace" after "war," so as to give Congress as a whole the power to declare both war and peace, it was unanimously voted down.<sup>2</sup>

These proceedings, together with those which took place in connection with the consideration of the treaty-making power, indicate that the convention assumed that there was no such similarity in the methods to be pursued in declaring war and in making peace as to require that both powers should be vested in the same branch of government. While the convention assumed that the power to make treaties

<sup>1</sup> *Journal of the Constitutional Convention* (Hunt ed.), II, 188.

<sup>2</sup> *Ibid.*, 189.



includes the power to make peace, it did not exclusively vest the latter power by an express grant in any branch of the Government, nor did it expressly deny such power to Congress. It may be that the members felt that if Congress were given the power to make peace, such a grant would be likely to be construed as exclusive, with the result that peace could not be made by the treaty-making power and *vice versa*. There is nothing, however, to indicate that the convention ever gave thought to the mode of procedure in two quite possible situations: first, where a war has resulted in the subjugation of the enemy and the overthrow of his government, so that no functionaries exist with which a treaty can be made, and second, where hostilities have long since ceased and the treaty-making power is impotent to conclude peace on account of an apparently irreconcilable difference of opinion between the President and the Senate over the terms of the treaty. Had these contingencies been considered, it is not clear that the convention would not have vested the power to declare peace, at least under such circumstances, in some body other than the treaty-making authority.

#### THE CONGRESSIONAL PEACE RESOLUTION

Procedure in the second of these two contingencies recently became a matter of practical importance on account of the failure of the President and the Senate, for a long time, to agree upon the terms of a treaty of peace with Germany. In view of the deadlock between the parts of the treaty-making authority, Congress essayed to take the initiative in restoring peace by passing, in May, 1920, a joint resolution which reads in part as follows: "That the joint resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and the Government and people of the United States, and making provisions to prosecute the same, be,

and the same is hereby, repealed, and said state of war is hereby declared at an end.”<sup>1</sup> This resolution was promptly vetoed by President Wilson. In July, 1921, however, Congress passed another joint resolution declaring peace, and President Harding as promptly approved it. The latter resolution was of similar tenor to the former one, but instead of expressly repealing the resolution of April, 1917, declaring war, it merely announced that such state of war was “hereby declared at an end.”<sup>2</sup>

The question of the power of Congress to declare peace after a foreign war, not having before arisen in a practical form, had been given comparatively little attention. There had been, however, some expressions of opinion, even if apparently contradictory. Hare, in his work on the Constitution, says: “It is the right of the President, and not of Congress, to determine whether the terms [of peace] are advantageous, and if he refuses to make peace, the war must go on.”<sup>3</sup> Similarly, in the report of the Judiciary Committee of the forty-ninth Congress on the treaty power, made by John Randolph Tucker, it is stated that “Congress cannot create the status of peace by repealing its declaration of war, because the former requires the concurrence of two wills, the latter but the action of one.”<sup>4</sup> In his commentaries on the Constitution, however, Tucker says: “Is there no end to the war except at the will of the President and Senate? No authority can be cited on the question, but the writer thinks a repeal of a law requiring war would be effectual to bring about the status of peace in place of war.”<sup>5</sup> Judge Baldwin appears to be of the same opinion. “Peace,” he says, “could no doubt also be restored by an act of Congress. As a declaration of war takes the shape with us of a statute, it would seem that it

<sup>1</sup> Cong. Record, May 15, 1920, vol. 59, p. 7680.

<sup>2</sup> *Ibid.*, July 1, 1921, vol. 61, p. 3454.

<sup>3</sup> J. I. C. Hare, *American Constitutional Law*, I, 171-2.

<sup>4</sup> Quoted in H. St. G. Tucker, *Limitations on the Treaty-Making Power*, 357.

<sup>5</sup> Tucker, *The Constitution of the United States*, II, 718.

can be repealed by a statute.”<sup>1</sup> A similar conclusion is reached by Whiting, who says: “As it is in the power of the Legislative Department to declare war, and to provide or withhold the means of carrying it on, Congress also may, after hostilities shall have ceased, declare or recognize peace.”<sup>2</sup>

These statements, while differing, are capable of being, at least to some extent, reconciled. Tucker, in the report cited, and Hare, are evidently speaking of a negotiated peace, which Congress admittedly cannot make, since it has no means of carrying on *pourparlers* directly with a foreign government. In the exercise of its power to regulate foreign commerce, or in the exercise of some other granted power, Congress can pass a law embodying proposed terms of peace and can make the operation of such law contingent upon the consent of the enemy government being secured to such terms. But the communication of the terms to the enemy and the notification by the enemy of its acceptance must be transmitted through the President, and such offer and acceptance would constitute an international agreement, if not a treaty. In his treatise on the Constitution, Tucker does not specify the sort of peace of which he is speaking; nor does Baldwin; and their statements, in the unqualified form in which they appear, cannot be accepted as invariably true. The determination of the question is dependent on collateral facts and circumstances, which vary in different cases. Whiting's statement, although general in form, doubtless refers primarily to the case of a civil war. Moreover, he does not assert the power of Congress to create a status of peace, but merely to declare or recognize the existence of peace after hostilities shall have ceased.

The concurring will to peace of the erstwhile enemy may be indicated, without formal notification, by reciprocal and

<sup>1</sup> Baldwin in *Am. Jour. of Internat. Law*, XII, 13-14 (Jan., 1918).

<sup>2</sup> Whiting, *War Powers Under the Constitution* (43rd ed.), 312.

extended intermission of hostilities, especially if evidenced by some positive action that there is no intention to renew them. It would hardly be maintained that Congress could end a foreign war by declaring peace while the war is being actively waged on both sides. Congress, of course, cannot appropriate funds for the support of the army for a longer period than two years, and it might withhold or limit appropriations for this purpose, whether hostilities are in progress or not, thereby tying the hands of the President in prosecuting a war and compelling him to sue for peace. Such action, however, would not end the war as a matter of legal status.

The passage of a peace resolution by Congress, based on the assumption that the former enemy has no intention of further prosecuting hostilities, would indicate a similar absence of intention on the part of our Government, in so far as Congress can determine our policy in such a matter, and would have weight as coming from that branch of the Government whose action and coöperation are necessary not only for the declaration of war but also for its vigorous prosecution. The passage of such a resolution would indicate that, so long at least as Congress remained of the same mind, funds for the further prosecution of the war would not be forthcoming. If coupled with the continued cessation of hostilities by the former enemy, it would constitute a concurrent undertaking to terminate the war without terms. It would not, however, preclude the subsequent making and ratification of a treaty defining the terms of peace. The concurrent undertaking to terminate the war might be only tacit, if the cessation of hostilities should be sufficiently continued; or the intention not to renew them might be indicated by positive action. In the case of the attempt to terminate the war with Germany, the undertaking of that power not to renew hostilities was evidenced by its ratification of the Treaty of Versailles, which itself provided that, upon its coming into force (after ratification

by Germany and three of the allied and associated powers), the state of war should terminate. In spite of this provision, the state of war between the United States and Germany continued, in the absence of ratification by the United States. But, even so, the war could doubtless have been terminated, without a treaty, by a similar concurrent undertaking on the part of the United States not to renew hostilities, as evidenced by a joint resolution of Congress.

A state of war may exist before it is formally declared by Congress. It has been customary for Congress not to declare war directly, but to recognize by declaration the existence of a state of war brought on by the acts of the foreign government against which the declaration is directed. The Constitution does not specifically give Congress the power to recognize the existence of a state of war, but it will not be denied that this power is implied and included in the power to declare war. Hence it may be argued that Congress has the implied power to recognize by declaration a state or condition in which war has in fact ceased, due to the long cessation of hostilities or to the complete subjugation of the enemy. Even though such a declaration might be regarded as having no international effect, it would still have domestic force with reference to the rights and duties of our citizens. Such a determination by Congress, as we have seen, has been recognized by the Supreme Court as having weight in a domestic sense in the case of our Civil War.<sup>1</sup> If the Confederacy had been successful, the Civil War would doubtless have been terminated by a treaty of peace. As it was, the method of termination probably differed but little from that which would be followed in the case of a foreign war in which the United States should completely subjugate the enemy and overthrow his government.

The ground upon which the power of Congress to declare peace is usually based is the power to repeal any act or

<sup>1</sup> U. S. v. Anderson, 9 Wall., 71.

resolution which the body has power to pass. Thus it has been said that "Congress has the right, simply by virtue of its power to repeal its previous enactments, to declare hostilities with Germany to be at an end, and its declaration to this effect, once duly enacted, will be binding upon the Courts and the Executive alike."<sup>1</sup> It does not necessarily follow, however, from the mere fact that Congress by act or joint resolution can create a status of war, that it can restore peace by a simple repeal of its former act. This seems to have been tacitly admitted by the framers of the Congressional peace resolution of 1920, which not only provided for the repeal of the previous declaration of war but expressly declared the state of war thereby created to be at an end. They thus assumed to exercise the power, not only to recognize the existence of peace by repealing the declaration of war, but also to create a status of peace by Congressional resolution. Without doubt, Congress can repeal its declaration of war. But the question is, Does such repeal operate to restore peace? In the Hicks case, cited above, in which it was contended that since Congress alone can begin war, it alone can terminate it, the court said: "But that does not follow, because the Constitution, while in express terms giving Congress the sole power of declaring war, in no way so expresses itself as to give that body any authority itself to terminate it."<sup>2</sup> Congress can pass an act or joint resolution admitting a state into the Union. But it would hardly be maintained that, after a state has once been admitted, Congress could expel it by a simple repeal of the act admitting it. Similarly, Congress can by resolution propose a constitutional amendment to the state legislatures for ratification. But when the proposed amendment has been transmitted to the legislatures the power of Congress over the matter is at an end.<sup>3</sup> These

<sup>1</sup> E. S. Corwin, "The Power of Congress to Declare Peace," *Mich. Law. Review*, XVIII, 674 (May, 1920).

<sup>2</sup> *U. S. v. Hicks*, 256 Fed., 707.

<sup>3</sup> Jameson, *The Constitutional Convention* (1st ed.), p. 505, sect. 549.

illustrations, however, merely indicate that Congress cannot always undo that which it has the power to do; they do not necessarily prove that it cannot restore peace by the repeal of a declaration of war.

Light on the question as to the power of Congress to restore peace may perhaps be drawn by analogy from the power to acquire new territory. This power also is not expressly granted in the Constitution to any branch of the Government. It has been implied from the power to make war and to make treaties,<sup>1</sup> and may also be derived from the principle that, in its international relations, the United States has such powers as international law recognizes in states generally. The usual method of acquiring territory has been by treaty. However, this plan has been followed only when there was a ceding power with which a treaty could be made and which continued to exist as an independent government after the annexation of the transferred territory to the United States. Texas and Hawaii were acquired by joint resolution of Congress. In both of these cases there was no government with which to make a treaty except the government of the territory annexed, which ceased to have an independent existence at the moment of annexation. Texas was annexed in pursuance of the express grant to Congress of the power to admit new states into the Union. But Hawaii was not admitted as a state, and its annexation represents a greater extension of Congressional power.

Another example of the acquisition of territory by Congress is found in the operation of the guano island act of 1856, which provides that when any citizen of the United States shall discover a guano island not occupied by the citizens of any other government and not within the lawful jurisdiction of any foreign country, and shall take peaceable possession of the same, such island may, at the discretion of the President, be considered as belonging to the

<sup>1</sup> American Insurance Co. v. Canter, 1 Pet., 511.

United States.<sup>1</sup> The validity of this act was tested in the Supreme Court, and that tribunal found ample warrant for the measure in the principle that, by international law, territory may be acquired by discovery or occupation, as well as by cession or conquest, and that when citizens of a nation take possession of unoccupied territory, the nation to which such citizens belong may exercise such jurisdiction as it sees fit over the territory so acquired.<sup>2</sup>

Thus the power of Congress to acquire territory by statute or joint resolution is recognized as proper where there is no foreign government with which a treaty can appropriately be made. The same distinction would be followed in case of the alienation of territory. If territory were to be alienated to a foreign power, it would seem that the treaty method would have to be adopted. But if the alienation should take the form of a grant of independence to a particular portion of the country, the appropriate method would be by statute or joint resolution.<sup>3</sup> Similarly, in the case of making peace, it would seem that when the United States subjugates the enemy and overthrows his government, it becomes the function of Congress by act or joint resolution to declare peace, since there is no government with which to make a treaty. Also, in the case of a prolonged cessation of hostilities (since this is recognized by international law as a method of ending war, if there is no intention of renewing such hostilities) the evidence of lack of intention on our part to resume hostilities might, if predicated on sufficient evidence of a similar lack of intention on the part of the former enemy, be given by Congressional act or joint resolution.<sup>4</sup> It has been objected that, if Congress can declare peace, it can pass a law to bring

<sup>1</sup>11 Stat. at L., 119.

<sup>2</sup>Jones v. United States, 137 U. S., 202.

<sup>3</sup>Willoughby, *Constitutional Law of the United States*, I, 513.

<sup>4</sup>Congress could obviously not take such action by concurrent resolution, since this would be an attempt to exclude the President from an act of a legislative character. The joint resolution could be passed over the President's veto, but the President could still prevent the full return of normal peace conditions by refusing to resume diplomatic relations.



the troops home, and thus interfere in the direction of the army in the midst of a campaign.<sup>1</sup> This does not necessarily follow. But even if it did so, the difficulty would be largely avoided by confining the power of Congress to declare peace to the two contingencies mentioned. Where, however, the government of the enemy has not been overthrown, nor have hostilities ceased for so long a time as to indicate that there is no intention of renewing them, the only appropriate way of ending war is by the exercise of the treaty power. Even if the treaty method is followed, the exact date of termination, so far as its domestic effect is concerned, may be determined by the President, since a treaty of peace is put into effect in a domestic sense by Presidential proclamation; and the date of termination as fixed in such proclamation need not correspond with the date of the exchange of ratifications of the definitive treaty of peace.

#### TERMINATION BY PRESIDENTIAL PROCLAMATION

If in either of the two contingencies mentioned, *i.e.*, the overthrow of the enemy's government and a prolonged cessation of hostilities, Congress fails to act, can the President bring the war to an end by proclamation? In August, 1919, Senator Fall, of New Mexico, propounded the following question to President Wilson: "In your judgment, have you not the power and authority, by a proclamation, to declare in appropriate words that peace exists and thus restore the status of peace between the Government and people of this country and those with whom we declared war?" The President's reply was: "I feel constrained to say . . . not only that in my judgment I have not the power by proclamation to declare that peace exists, but that I could in no circumstances consent to take such a course

<sup>1</sup>Speech of Mr. Connally in House of Representatives, Cong. Record, April 8, 1920, vol. 59, p. 5772.

prior to the ratification of a formal treaty of peace.”<sup>1</sup> In view of the fact that neither of the two conditions in which Congress can declare peace then existed, as well as because the treaty of peace pending in the Senate had been neither ratified nor rejected by that body, there seems to be no reason to question the correctness of the President’s answer. But if either of these two conditions had existed, there would have been some ground to believe, by analogy with the method of ending the Civil War, that the President had the power in question, although, as already indicated, the matter is involved in some doubt. In one case, as we have seen, the Supreme Court seemed to consider the dates of the termination of the Civil War as depending on the proclamations of the President, without taking into account the concurrent action of Congress.<sup>2</sup> The dates chosen by the President were, however, sanctioned by a subsequent act of Congress; and the Supreme Court, in other cases, seems to have considered the action of Congress as of substantial, if not controlling, weight in determining the end of the Civil War.<sup>3</sup> The situation with reference to the power in question seems analogous to that existing with regard to the power to permit limited intercourse with the enemy in time of war. In each case, it would seem that the President alone may exercise the power, although probably not against the expressed will of Congress; but, whether so or not, he may exercise it with the concurrent authority of Congress.<sup>4</sup> In the absence of any conflicting action on the part of Congress, the courts would doubtless consider themselves bound, in determining private rights,

<sup>1</sup> Cong. Record, Aug. 22, 1919, pp. 4434, 4435.

<sup>2</sup> The *Protector*, 12 Wall., 700.

<sup>3</sup> U. S. v. Anderson, 9 Wall., 71.

<sup>4</sup> Hamilton v. Dillin, 21 Wall., 73. In this connection it may be pointed out that certain war-time acts of Congress indicate that in the opinion of that body the President alone, by proclamation, can at least recognize the termination of war for the purpose of indicating the period during which such legislation shall operate. See, e.g., 40 Stat. at L., 412.

by the President's proclamation; in the case of the *Protector*, the Supreme Court avowedly considered itself so bound, "in the absence of more certain criteria, of equally general application."<sup>1</sup>

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<sup>1</sup> 12 Wall., 700.

## CHAPTER XXXII

### CONCLUSION

**I**N providing for the conduct of foreign relations the framers of our Constitution were guided by two main motives or attitudes: (1) high regard for the principle of separation of powers, and (2) jealousy of arbitrary executive power as exemplified in old-world institutions. Hamilton pointed out in the *Federalist* that the king of Great Britain was "the sole and absolute representative of the nation in all foreign transactions." The founders of our republic, however, had no intention to make the President a dictator in foreign relations. They were men of sufficient practical acquaintance with public affairs to know that the chief executive must be given a large measure of control in this field. None the less, they rigorously applied the principle of checks and balances by requiring the concurrence of the Senate both in treaty-making and in diplomatic appointments. Moreover, they deemed it wise that in the determination of peace or war the direct representatives of the people should have such a degree of control that no declaration of war could be issued without their consent. This was at the time a striking innovation, an arrangement paralleled nowhere in Europe, and it apparently represented the establishment of a broadly democratic basis for that phase of our foreign relations which touches the interests of the whole people most closely.

Despite the theory of the Constitution, as thus outlined, the President has, in practice, assumed a degree of power which is almost tantamount to a dictatorship in the conduct of foreign relations. It is true that he is not absolute, and that in the pursuit of his foreign policies he sometimes re-

ceives notable rebuffs. The principal check upon his control is the power of the Senate in treaty-making, which has not infrequently been so employed as to interfere with his purposes, or even to thwart them completely. None the less, the President may evade this check by making international agreements which are not submitted to the Senate; he may get around the constitutional requirement of Senatorial confirmation of his diplomatic appointments by appointing special diplomatic agents on his sole authority; and in practice he has so largely assumed the initiative in matters of war and peace that, as a rule, Congress merely ratifies the decision which he has reached.

Why has the theory of the Constitution been so far departed from in practice? The main reason is that the conduct of foreign relations is fundamentally an executive, rather than a legislative, function. By its nature as a continuous and unified organ the executive is better adapted to secure and exercise control in this field than a legislative body can be. It is true that the legislative power of appropriating the public funds carries with it here, as in other fields of governmental activity, an important and pervasive influence. But this influence is usually indirect. The powers of the President are direct, and they enable him to take and hold the initiative and to act with secrecy and dispatch when such methods are desirable. Moreover the President is in immediate touch with the sources of official information and is thus enabled to act with more adequate knowledge than can Congress, which is ordinarily dependent for information upon the action of the President in voluntarily transmitting it. The Presidential office is thus fundamentally and intrinsically better adapted than a legislative body for the control of foreign relations; although the amount and kinds of control actually exercised vary from period to period, according partly to the urgency of foreign problems, partly to the personal prestige of the

incumbent of the office, and partly to the degree of political harmony, or the lack of it, between him and Congress.

Under the principle of separation of powers, the President and the two branches of Congress are largely independent one of another. Yet their concurrent action is frequently necessary to the performance of functions which, directly or indirectly, affect foreign relations. In order that, under these circumstances, foreign affairs may be conducted without friction or deadlock, it is highly desirable, and almost necessary, that the relations of these coördinate organs of the Government be permeated with a spirit of comity. The power and the responsibility, however, rest largely with the President. He is not responsible to Congress in the sense that the executive is responsible to the legislature in European parliamentary governments. His responsibility is rather to the people, from whom all power and authority are ultimately derived, and to whom an accounting for his official stewardship must finally be made.

## **APPENDICES**





## APPENDIX I

### WASHINGTON'S PROCLAMATION OF NEUTRALITY, 1793

**W**HEREAS it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other, and the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

And I do hereby also make known that whatsoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the *modern* usage of nations, will not receive the protection of the United States, against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them.

In testimony whereof I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia, the twenty-second day of April, one thousand seven hundred and ninety-three, and of the independence of the United States the seventeenth.

GO. WASHINGTON.

By the President

TH. JEFFERSON.

## APPENDIX II

### PRESIDENT WILSON'S FOURTEEN POINTS <sup>1</sup>

I. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.

II. Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

III. The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.

IV. Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety.

V. A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

VI. The evacuation of all Russian territory and such a settlement of all questions affecting Russia as will secure the best and freest coöperation of the other nations of the world in obtaining for her an unhampered and unembarrassed opportunity for the independent determination of her own potential development and national policy and assure her of a sincere welcome into the society of free nations under institutions of her own choosing: and, more than a welcome, assistance also of every kind that she may need and may herself desire. The treatment accorded

<sup>1</sup> Contained in an address to a joint session of Congress on January 8, 1918.

Russia by her sister nations will be the acid test of their good will, of their comprehension of her needs as distinguished from their own interests and of their intelligent and unselfish sympathy.

VII. Belgium, the whole world will agree, must be evacuated and restored, without any attempt to limit the sovereignty which she enjoys in common with all other free nations. No other single act will serve as this will serve to restore confidence among the nations in the laws which they have themselves set and determined for the government of their relations with one another. Without this healing act the whole structure and validity of international law is forever impaired.

VIII. All French territory should be freed and the invaded portions restored, and the wrong done to France by Prussia in 1871 in the matter of Alsace-Lorraine which has unsettled the peace of the world for nearly fifty years, should be righted, in order that peace may once more be made secure in the interest of all.

IX. A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality.

X. The peoples of Austria-Hungary whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity of autonomous development.

XI. Rumania, Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkan states to one another determined by friendly counsel along historically established lines of allegiance and nationality; and international guarantees of the political and economic independence and territorial integrity of the several Balkan states should be entered into.

XII. The Turkish portions of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development, and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees.

XIII. An independent Polish state should be erected

which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political integrity should be guaranteed by international covenant.

XIV. A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.

## APPENDIX III

### COVENANT OF THE LEAGUE OF NATIONS

With amendments in force March 1, 1937

#### THE HIGH CONTRACTING PARTIES

In order to promote international coöperation and to achieve international peace and security  
by the acceptance of obligations not to resort to war,  
by the prescription of open, just and honorable relations between nations,  
by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and  
by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another.  
Agree to this Covenant of the League of Nations.

#### ARTICLE 1

##### *Membership and Withdrawal*

1.<sup>1</sup> The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant, and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accessions shall be effected by a declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

2. Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the

<sup>1</sup> Paragraphs numbered in accordance with Assembly resolution of September 21, 1926.

Assembly, provided that it shall give effective guaranties of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

3. Any Member of the League may, after two years' notice of its intentions so to do withdraw from the League provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

## ARTICLE 2

### *Executive Organs*

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

## ARTICLE 3

### *Assembly*

1. The Assembly shall consist of representatives of the Members of the League.

2. The Assembly shall meet at stated intervals and from time to time, as occasion may require, at the Seat of the League, or at such other place as may be decided upon.

3. The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

4. At meetings of the Assembly each Member of the League shall have one vote and may have not more than three Representatives.

## ARTICLE 4

### *Council*

1. The Council shall consist of representatives of the Principal Allied and Associated Powers [United States of

America, the British Empire, France, Italy and Japan], together with Representatives of four<sup>1</sup> other Members of the League. These four<sup>1</sup> Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Greece and Spain shall be Members of the Council.

2. With the approval of the majority of the Assembly, the Council may name additional Members of the League, whose Representatives shall always be Members of the Council;<sup>2</sup> the Council with like approval may increase the number of Members of the League to be selected by the Assembly<sup>2</sup> for representation on the Council.<sup>1</sup>

2 bis.<sup>3</sup> *The Assembly shall fix by a two-thirds majority the rules dealing with the election of the non-permanent Members of the Council, and particularly such regulations as relate to their term of office and the conditions of re-eligibility.*

3. The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

4. The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

5. Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

6. At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative.

<sup>1</sup> The number of Members of the Council selected by the Assembly, by application of the second clause of Art. 4, par. 2, was increased from four to six on September 25, 1922, and from six to nine on September 8, 1926.

<sup>2</sup> By application of this clause Germany was designated as a permanent Member of the Council on September 8, 1926, the appropriate action of the Council having been taken on September 4.

<sup>3</sup> This paragraph came into force on July 29, 1926, in accordance with Art. 26. The regulations were adopted by the Assembly on September 15.

## ARTICLE 5

*Voting and Procedure*

1. Except where otherwise expressly provided in this Covenant, or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

2. All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.

3. The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

## ARTICLE 6

*Secretariat and Expenses*

1. The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary-General and such secretaries and staff as may be required.

2. The first Secretary-General shall be the person named in the Annex; thereafter the Secretary-General shall be appointed by the Council with the approval of the majority of the Assembly.

3. The secretaries and the staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Council.

4. The Secretary-General shall act in that capacity at all meetings of the Assembly and of the Council.

5. <sup>1</sup> *The expenses of the League shall be borne by the*

<sup>1</sup> This paragraph came into force as an amendment on August 13, 1924, in accordance with Art. 26. The original provision was as follows:

"The expenses of the Secretariat shall be borne by the Members of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union."



*Members of the League in the proportion decided by the Assembly.*

## ARTICLE 7

### *Seat, Qualifications of Officials, Immunities*

1. The Seat of the League is established at Geneva.
2. The Council may at any time decide that the Seat of the League shall be established elsewhere.
3. All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.
4. Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.
5. The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

## ARTICLE 8

### *Reduction of Armaments*

1. The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.
2. The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.
3. Such plans shall be subject to reconsideration and revision at least every 10 years.
4. After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.
5. The Members of the League agree that the manufacture by private enterprise of munitions and implements of

war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

6. The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programs, and the condition of such of their industries as are adaptable to warlike purposes.

#### ARTICLE 9

##### *Permanent Military, Naval and Air Commission*

A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Articles 1 and 8 and on military, naval and air questions generally.

#### ARTICLE 10

##### *Guaranties Against Aggression*

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.

#### ARTICLE 11

##### *Action in Case of War or Threat of War*

1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary-General shall,

on the request of any Member of the League, forthwith summon a meeting of the Council.

2. It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

## ARTICLE 12<sup>1</sup>

### *Disputes to Be Submitted for Settlement*

1. The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or *judicial settlement* or to inquiry by the Council and they agree in no case to resort to war until three months after the award by the arbitrators or the *judicial decision*, or the report by the Council.

2. In any case under this Article, the award of the arbitrators or the *judicial decision* shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

## ARTICLE 13<sup>2</sup>

### *Arbitration or Judicial Settlement*

1. The Members of the League agree that, whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration or *judicial settlement*, and which can not be satisfactorily settled by diplo-

<sup>1</sup>The text as printed came into force as an amendment on September 26, 1924, in accordance with Art. 26. The original text was as follows:

"The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council.

"In any case under this Article the award of the arbitrators shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute."

<sup>2</sup>The text as printed came into force as an amendment on September 26, 1924, in accordance with Art. 26. The original text was as follows:

"The Members of the League agree that, whenever any dispute shall arise

macy, they will submit the whole subject-matter to arbitration *or judicial settlement*.

2. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration *or judicial settlement*.

3. *For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.*

4. The Members of the League agree that they will carry out in full good faith any award *or decision* that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award *or decision*, the Council shall propose what steps should be taken to give effect thereto.

## ARTICLE 14<sup>1</sup>

### *Permanent Court of International Justice*

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of between them which they recognize to be suitable for submission to arbitration and which can not be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration.

"Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

"For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.

"The Members of the League agree that they will carry out in full good faith any award that may be rendered and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto."

<sup>1</sup>The first sentence of this article has been fulfilled. The Council on February 13, 1920, appointed an Advisory Committee of Jurists to report a

a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

## ARTICLE 15<sup>1</sup>

### *Disputes Not Submitted to Arbitration or Judicial Settlement*

1. <sup>2</sup> If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration *or judicial settlement* in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof.

2. For this purpose the parties to the dispute will communicate to the Secretary-General, as promptly as possible, statements of their case, with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

3. The Council shall endeavor to effect a settlement of scheme to it. The draft Statute, prepared by the Committee June 16-July 24, 1920, was revised and finally approved by the Council on October 28. It was then submitted to the First Assembly for consideration of representatives of Members of the League. The plan, called a Statute, is attached to a protocol of signature of December 16, 1920, the ratification of which constitutes adoption of the plan by Members of the League and other states.

The stipulations of the second sentence are carried out by Art. 36 of the Statute. Cognizance is taken of the third sentence in Arts. 71-74 of the Rules of Court.

<sup>1</sup> On interpretations of pars. 1 and 8, see *Official Journal*, V, p. 524, and for the replies of the Governments, Document 1926. V. 12.

<sup>2</sup> The text of the first paragraph as printed came into force as an amendment on September 26, 1924, in accordance with Art. 26. The original text was as follows:

"If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof."

the dispute and, if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

4. If the dispute is not thus settled, the Council, either unanimously or by a majority vote, shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

5. Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

6. If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

7. If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

8. If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

9. The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within 14 days after the submission of the dispute to the Council.

10. In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League,

exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

## ARTICLE 16

### *Sanctions of Pacific Settlement*

1. <sup>1</sup> Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby

<sup>1</sup> The Assembly has voted in favor of the following amendments to Art. 16, to replace paragraph one, and the Members are now deciding upon their ratification:

"Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations and to prohibit all intercourse at least between persons resident within their territories and persons resident within the territory of the covenant-breaking State and, if they deem it expedient, also between their nationals and the nationals of the covenant-breaking State, and to prevent all financial, commercial or personal intercourse at least between persons resident within the territory of that State and persons resident within the territory of any other State, whether a Member of the League or not, and, if they deem it expedient, also between the nationals of that State and the nationals of any other State whether a Member of the League or not."

[N.B.—The above amendment was voted by the Fifth Assembly on September 27, 1924, to supersede an amendment voted by the Second Assembly and which was being ratified in the following form: "... which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between persons residing in their territory and persons residing in the territory of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between persons residing in the territory of the covenant-breaking State and persons residing in the territory of any other State, whether a Member of the League or not."]

"It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council, the votes of Members of the League alleged to have resorted to war and of Members against whom such action was directed shall not be counted.

"The Council will notify to all Members of the League the date which it recommends for the application of the economic pressure under this Article.

"Nevertheless, the Council may, in the case of particular Members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such a postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimize the loss and inconvenience which will be caused to such Members."

undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

2. It shall be the duty of the Council in such case<sup>1</sup> to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

3. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are coöperating to protect the covenants of the League.

4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

## ARTICLE 17

### *Disputes Involving Nonmembers*

1. In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the

<sup>1</sup>The Assembly on September 21, 1925, adopted a resolution providing that the words "in such case" shall be deleted. The amendment has been submitted to Member States for ratification.



Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16, inclusive, shall be applied with such modifications as may be deemed necessary by the Council.

2. Upon such invitation being given, the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

3. If a State so invited shall refuse to accept the obligations of Membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

4. If both parties to the dispute, when so invited refuse to accept the obligations of Membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

## ARTICLE 18

### *Registration and Publication of Treaties*

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

## ARTICLE 19

### *Review of Treaties*

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world

## ARTICLE 20

*Abrogation of Inconsistent Obligations*

1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

2. In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligation inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

## ARTICLE 21

*Engagements that Remain Valid*

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

## ARTICLE 22

*Mandatory System*

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this prin-

ciple is that the tutelage of such peoples should be intrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

4. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

5. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

6. There are territories, such as Southwest Africa and certain of the South Pacific islands, which, owing to the sparseness of their population or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates.

## ARTICLE 23

### *Social and Other Activities*

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(a) will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

(c) will intrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs;

(d) will intrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind;

(f) will endeavor to take steps in matters of international concern for the prevention and control of disease.

## ARTICLE 24

*International Bureaus*

1. There shall be placed under the direction of the League all international bureaus already established by general treaties, if the parties to such treaties consent. All such international bureaus and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

2. In all matters of international interest which are regulated by general conventions but which are not placed under the control of international bureaus or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable.

3. The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.

## ARTICLE 25

*Promotion of Red Cross and Health*

The Members of the League agree to encourage and promote the establishment and coöperation of duly authorized voluntary national Red Cross organizations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.

ARTICLE 26<sup>1</sup>*Amendments*

1. Amendments to this Covenant will take effect when ratified by the Members of the League whose Representa-

<sup>1</sup> The Assembly voted in favor of the following amendments to replace Art. 26, in 1921, and the Members are now deciding upon its ratification:

tives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly.

2. No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.

## ANNEX

### I. ORIGINAL MEMBERS OF THE LEAGUE OF NATIONS, SIGNATORIES OF THE TREATY OF PEACE.

United States of America	Haiti
Belgium	Hedjaz
Bolivia	Honduras
Brazil	Italy
British Empire	Japan
Canada	Liberia
Australia	Nicaragua
South Africa	Panamá
New Zealand	Perú
India	Poland
China	Portugal
Cuba	Rumania
Ecuador	Serb-Croat-Slovene State
France	Siam
Greece	Czechoslovakia
Guatemala	Uruguay

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*"Amendments to the present Covenant the text of which shall have been voted by the Assembly on a three-fourths majority, in which there shall be included the votes of all the Members of the Council represented at the meeting, will take effect when ratified by the members of the League whose Representatives composed the Council when the vote was taken and by the majority of those whose Representatives form the Assembly.*

*"If the required number of ratifications shall not have been obtained within twenty-two months after the vote of the Assembly, the proposed amendment shall remain without effect.*

*"The Secretary-General shall inform the Members of the taking effect of an amendment.*

*"Any Member of the League which has not at that time ratified the amendment is free to notify the Secretary-General within a year of its refusal to accept it, but in that case it shall cease to be a Member of the League."*

\* Not a Member state.

## STATES INVITED TO ACCEDE TO THE COVENANT

Argentine Republic	Persia
Chile	Salvador
Colombia	Spain
Denmark	Sweden
Netherlands	Switzerland
Norway	Venezuela
Paraguay	

## II. FIRST SECRETARY-GENERAL OF THE LEAGUE OF NATIONS

The Honorable Sir James Eric Drummond, K.C.M.G., C.B.

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## STATES ADMITTED TO MEMBERSHIP

Abyssinia	Finland
Albania	Germany
Austria	Hungary
Bulgaria	Irish Free State
Costa Rica	Latvia
Dominican Republic	Lithuania
Estonia	Luxemburg

Not a Member state.

## APPENDIX IV

### THE LEAGUE OF NATIONS AND THE CONSTITUTION \*

THE Covenant for a League of Nations has justly aroused an immense amount of discussion in this country, since it undoubtedly presents to the American nation the most important of the many questions of foreign policy growing out of the Great War. Most of this discussion has dealt with the matter solely from the standpoint of policy or expediency, without noticing the interesting constitutional questions involved. When the Covenant has, on occasion, been considered from the constitutional point of view, such consideration has generally been merely incidental and the writer's or speaker's views as to the desirability of subscribing to the Covenant have too frequently and perhaps unconsciously colored his conclusions as to its constitutionality. In this paper an attempt is made to discuss the constitutional issues involved, but without expressing any opinion as to the advisability of the United States becoming a member of the League.

Since the Covenant is a treaty or part of a treaty, the question as to whether it is constitutional or not naturally depends upon the answer to the further question as to whether it is within the competence of the treaty-making body to bind the United States to such an agreement. The first question of a constitutional nature which has been raised in reference to the Covenant is aimed at the method which has been pursued in negotiating the treaty, rather than at the provisions of the Covenant itself. It has been alleged that the President failed to consult the Senate before laying before that body the complete draft for its approval, and that the treaty has therefore not been made with the advice of the Senate as contemplated by the Constitution.<sup>1</sup> It is doubtless true that the Constitution framers intended that there should

\* Reprinted from the author's article in *Michigan Law Review*, XVIII (March, 1920).

<sup>1</sup> C. A. HERESHOFF BARTLETT, "THE CONSTITUTION OR THE LEAGUE OF NATIONS; WHICH?" 53 *AMERICAN LAW REVIEW*, 527-530.



be close coöperation between the President and the Senate during the course of the negotiations, as the Senate was expected to be primarily an executive council for the President. Since treaties become, however, when proclaimed by the President, a part of the law of the land, the Senate has acted on the theory that, in advising and consenting to their ratification, it is acting in its representative capacity, rather than as an executive council. It is true that President Washington consulted the Senate in person in regard to a proposed treaty, but the Senate insisted on referring the proposal to a committee for consideration, where the President would not be present, and Washington declared that this defeated every purpose of his coming there.<sup>1</sup> There have also been later instances where the President has taken the Senate into his confidence during the course of negotiations, but it is now well established that the President may or may not do so, depending on his own views of expediency. The Senate may, on this account, fail to act favorably on the treaty, but it might, of course, take the same action, even if it had been consulted. The Senate has no right to demand of the President information relating to the negotiations connected with a pending treaty, and, when making requests for such information, stipulates that it be furnished, "if not incompatible with the public interests," which leaves full discretion in the hands of the President.<sup>2</sup> Failure of the President, therefore, to consult the Senate or to furnish that body with information during negotiations in no way affects the validity of the treaty if the Senate duly advises and consents to its ratification.

Another constitutional objection which has been made to the method of negotiating the treaty for the League of Nations is that it has been made a part of the treaty of peace, and the two parts have been so "inextricably intertwined" that the Senate, in order to secure peace, is practically forced to consent to the ratification of both parts, regardless of its judgment as to whether it is expedient to subscribe to that part dealing with the League. By adopting this method, the President, it is alleged, comes into

<sup>1</sup> MACLAY'S JOURNAL, p. 131.

<sup>2</sup> This, of course, is a different question from that as to what information the President should furnish the Senate when he submits to it the completed draft of the proposed treaty.

absolute control of the treaty-making power, the Senate is coerced into consenting to ratification against its will, its free judgment in the matter which the Constitution intended it to exercise is nullified, and the constitutional division of power between the President and the Senate in treaty-making is effaced.<sup>1</sup> It is true that the President can create conditions and shape events in such manner as practically to deprive the Senate of free judgment. But all this is involved in the President's power of negotiation, just as the President, in the conduct of foreign relations, may bring about conditions which practically compel Congress to declare war. Similarly, Congress, on its side, may turn the tables by attaching riders to appropriation bills, which the President may be practically compelled to sign, or to allow to become law, against his better judgment. In none of these cases, however, does the prior action of one branch of the government preclude the other from exercising complete legal freedom of action. This, therefore, is a matter, not of law, but of politics.

It appears, then, that no constitutional objections arise in connection with the process and manner of negotiating the treaty containing the Covenant. The contention of unconstitutionality, therefore, if sustained, must be based upon an alleged conflict between the Constitution and the provisions of the Covenant itself.

It is obvious that many of the provisions of the Covenant are merely advisory in character and place upon the contractuaries merely moral obligations even in the international sense. On this account no constitutional questions would arise in connection with them, and, for the purposes of this paper, they may be omitted from consideration. There are other provisions, however, about which, on account of the limitations of human language if for no other reason, doubts may be entertained as to their meaning and interpretation in reference to the character of the obligation incurred under them. On this account disputes may arise between this country and other members of the League as to the interpretation of the treaty. Provision is made in Articles XIII and XV for the settlement of disputes between members either by arbitration or by submission to the League Council, and disputes as to the inter-

<sup>1</sup> Cf. D. J. HILL, "PRESENT PROBLEMS IN FOREIGN POLICY," pp. 162-3.

pretation of a treaty are specifically mentioned as suitable for submission to arbitration. On the other hand, our Constitution provides that the judicial power vested in the courts of the United States shall extend to all cases in law and equity arising under treaties made under their authority, and, in exercising such power, it may become necessary for the courts to interpret the meaning of treaties in applying their provisions to cases brought before them. Have we here a conflict between the Constitution and the Covenant? If so, then it was unconstitutional for the United States to enter into the numerous treaties in which we undertook to submit, by special agreement, to the permanent court of arbitration at The Hague international differences which might arise of a legal nature or relating to the interpretation of treaties existing between the contractuaries.<sup>1</sup> Further to answer this question, it should be borne in mind that a treaty of the United States may be considered from two points to view, first, as a part of the municipal law of the land, and, secondly, as an international contract. This is a distinction which is frequently overlooked, but which is fundamental to any adequate consideration of the question before us. The courts construe treaties as laws when they are self-executory and private rights are involved, but they have no jurisdiction to settle disputes between the contracting parties. From the standpoint of contract, when an allegation of non-performance gives rise to a dispute between the contractuaries as to the interpretation of the contract, this is a political question and, not being suitable for submission to the national courts of either party, is reserved for settlement by arbitration or by submission to the League Council.

Although treaties, under the Constitution, are a part of the supreme law of the land, and although that instrument declares that the judicial power of the United States shall extend to all cases arising under treaties made under their authority, this is true only in so far as such treaties are self-executory.<sup>2</sup> Where, through the treaty-making power, a contract is entered into with the foreign government to perform certain acts requiring supplementary legislation or to refrain from performing certain acts, the enforcement of

<sup>1</sup> See, e. g., 35 U. S. Stat. at L., 1994.

<sup>2</sup> *Turner v. American Baptist Union*, Fed. Cas. No. 14,251.

such a stipulation is naturally dependent upon the action, non-action, or limited action of the legislative department and no judicial question is directly presented. Thus, as the Supreme Court declared in an early case, a treaty "is to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."<sup>1</sup> Similarly, it follows that where the treaty contains a contractual provision whereby it is agreed that certain action shall or shall not be taken by the executive department of our government, no judicial question is directly presented, regardless as to whether such action is, or is not, taken by the executive.

If we examine the text of the Covenant, we find many such contractual provisions in which it is agreed that future or supplemental action shall be taken by the legislative or executive departments of our government, and others where the government is bound not to take certain action which it would otherwise be free to take. It is believed, however, that there is no provision in the Covenant requiring supplementary action by the legislative or executive departments of our government which those departments would not be constitutionally competent to perform even in the absence of a treaty; while, moreover, it is well established that the power of Congress to pass legislation for the enforcement of treaties is broader than its ordinary legislative power.<sup>2</sup> Therefore, if such acts are passed, no case could be made out against their constitutionality, while, on the other hand, if such acts are not passed, such non-action on our part might give rise to the accusation of bad faith by other nations, but no question would arise in our courts.

It might be supposed that, due to the predominantly contractual character of the Covenant, it would be difficult if not impossible to bring its provisions before the courts for

<sup>1</sup> *Foster and Elam v. Neilson*, 2 Pet., 314 (1829).

<sup>2</sup> Congress must have the power to pass the necessary legislation to enforce a valid treaty, even though in the absence of such treaty Congress would have no such power, for, otherwise, the treaty-making power would, in many cases, be rendered virtually nugatory.

construction, since they present political rather than judicial questions. But, even though no citizen were allowed a standing in court for the purpose of suing to enjoin the expenditure of public funds to pay the salaries of our representatives in the organs of the League or our share of the expenses of the Secretariat, it would be rash to affirm that no question as to the constitutionality of the Covenant could arise in the courts in a collateral, if not direct, proceeding. No case is known where a treaty has been declared unconstitutional, though the courts have refused to apply treaties when in conflict with later acts of Congress, but the international obligation involved was not thereby affected. It may be admitted that a treaty provision may be unconstitutional, even though incapable of being so decided by the courts. But, in such case, who is to judge unless it be the treaty-making body itself? And does not the action of that body in negotiating and consenting to the ratification of the treaty obviously imply that, in the opinion of such body, the treaty is constitutional? Moreover, it is reasonable to assume that treaties are entitled to the same presumption in favor of their constitutionality as is accorded by the courts to acts of Congress. In fact, this presumption is even stronger in the case of treaties since the powers of Congress are enumerated, while those of the treaty-making body are not enumerated but granted in broad terms. In other words, it is not to be presumed that the treaty-making body would undertake to make a treaty which is in excess of its powers under the Constitution, and it is not, therefore, to be presumed that a treaty is unconstitutional until so decided by competent authority.

The Supreme Court of the United States has declared it to be clear that "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations." Although the treaty-making power does not extend so far as to authorize what the Constitution forbids or a change in the character of the government, or in that of one of the states, it is not perceived, said the court, that, with these exceptions, "there is any limit to the questions which can be adjusted touching any matter which is properly 'the subject of negotiation with a foreign country.'" <sup>1</sup> In the course

<sup>1</sup> *De Geofroy v. Riggs*, 133 U. S., 267.

of the development of the relations between nations, a matter which was not formerly a proper subject of international negotiation may become so with the progressive increase in the intimacy of contact and intercourse between nations. Therefore, even if the Covenant were entirely unprecedented in all its features, it would not necessarily follow that the treaty-making power is incompetent to deal with it. If, on the other hand, it can be shown that precedents exist in previous international agreements into which the United States has entered for most of the important provisions of the Covenant, the presumption in favor of its constitutionality will be greatly strengthened.

In Article VI of the Covenant it is provided that the expenses of the Secretariat shall be borne by the members of the League in accordance with a designated rule of apportionment. It is obvious that this provision implies that Congress shall make an appropriation for its execution. The Constitution provides that no money shall be drawn from the treasury except in consequence of appropriations made by law. Since treaties are declared by that instrument to be laws, it might be supposed at first sight that money might be appropriated by treaty. But the Constitution also requires that all bills for raising revenue shall originate in the House of Representatives, and, by custom, this special privilege of the House has been enlarged so as to include also bills to appropriate money. Consequently, money cannot be appropriated by the treaty-making body, but only by a law enacted with the concurrence of both branches of the legislature. Congress must therefore act in order that this provision of the treaty may be carried into execution. But this is nothing new. As is well known, there have been numerous treaties from Jay's treaty down to the present time, which have required for their enforcement the appropriation of money by act of Congress. Although the House of Representatives has asserted its right to exercise its own discretion as to whether it shall make such appropriation, it is believed that it has never refused to take the necessary action to provide means for the enforcement of a treaty.

In Article X of the Covenant the contractuaries undertake to respect and preserve as against external aggression the territorial integrity and existing political independence

of all the members of the League. It is further stipulated that, in case of any such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled. By Article XI any war or threat of war is declared to be matter of concern to the whole League, and "the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." It has been alleged that, by these articles, the Covenant attempts to transfer the power to declare war from Congress to the Council of the League, in defiance of the Constitution.<sup>1</sup> But the action to be taken by the Council in case of war or threat of war may reasonably be construed to mean no more than the adoption of recommendations to the contractuaries that war be declared against any peace-breaking power. Further, under the circumstances mentioned in Article X, the Council might advise a declaration of war, but since the nature of advice is such that it need not be accepted, the members of the League would be under no legal obligation, even in the international sense, to accept such advice. Since, however, the contractuaries undertake to preserve their mutual independence and territorial integrity, they would be under a legal obligation, in the international sense, to take such action as would reasonably be conducive to the accomplishment of these ends.

By Article XVI it is provided that "should any member of the League resort to war in disregard of its covenants . . . it shall *ipso facto* be deemed to have committed an act of war against all other members of the League." This provision, says Judge A. S. Van Valkenburg, "contemplates that we may automatically be placed in a state of war against some other nation without the action of Congress, to which is confided (by the Constitution) the exclusive power of determination."<sup>2</sup> This argument overlooks the fact that, even from the standpoint of our municipal law, the United States may be placed in a state of war through the offensive warlike acts of another power and without any action on the part of Congress.<sup>3</sup> Article XVI merely recognizes the fact that the United States can no longer remain indifferent to an invasion of the peace of the world, even

<sup>1</sup> See, e. g., C. A. HERESHOFF BARTLETT, *loc. cit.*, pp. 514-5.

<sup>2</sup> Address reprinted in the CONGRESSIONAL RECORD, vol. 58, p. 146.

<sup>3</sup> *Of. Prize Cases*, 2 Black, 635.

though we may not be immediately or directly attacked by any foreign power.

It is by no means unprecedented for the treaty-making body to bind the nation to go to war or to take warlike action under certain circumstances. Thus, by the Webster-Ashburton treaty of 1842, we agreed with Great Britain to maintain a naval force on the coast of Africa for the suppression of the slave trade.<sup>1</sup> Under our treaty of 1846 with New Granada (Colombia) we guaranteed the "perfect neutrality" of the Isthmus of Panama,<sup>2</sup> and we entered into a similar covenant with Great Britain respecting the Isthmian canal by the Clayton-Bulwer treaty of 1850.<sup>3</sup> Through our treaty of 1904 with Panama, we undertook to guarantee and maintain the independence of that republic,<sup>4</sup> and, at about the same time, we extended by implication the same guarantee to Cuba.<sup>5</sup> These treaty provisions do not go so far as to require a declaration of war, but they almost necessarily imply intervention or warlike measures on our part in case the independence or neutrality guaranteed is threatened or in imminent danger.

In Article XVI the members of the League also agree, under certain circumstances, to sever trade relations with a member resorting to war in violation of its obligations under the Covenant. It is urged that this provision infringes upon the well-established power of Congress to place embargoes upon the export of goods to certain countries. But many treaties have been entered into dealing with embargoes or involving a modification of the revenue laws. Thus, by our treaty of 1795 with Spain, it was agreed that "the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other."<sup>6</sup> If such treaties are unconstitutional, then, in the language of Calhoun, "its (the treaty-making power's) exercise has been one continual series of habitual and uninterrupted infringements of the Constitution."<sup>7</sup> It may be true that the

<sup>1</sup> W. M. MALLOY, *TREATIES, CONVENTIONS, ETC.*, p. 655.

<sup>2</sup> MALLOY, *op. cit.*, p. 312.

<sup>3</sup> *Ibid.*, p. 661.

<sup>4</sup> *Ibid.*, p. 1349.

<sup>5</sup> *Ibid.*, p. 364.

<sup>6</sup> *Ibid.*, p. 1643.

<sup>7</sup> J. B. MOORE, *DIGEST OF INTERNATIONAL LAW*, vol. V, p. 164.



treaty-making body cannot of itself repeal existing revenue acts, but there is no doubt of its competence to bind the government, in an international sense, with reference to the imposition of custom duties, even though Congressional action may be necessary to carry out the agreement. If the treaty-making power can provide against the imposition of embargoes, there is no difference in principle in adopting by treaty an agreement for establishing an embargo or international economic boycott in a certain contingency.

It has been argued that the necessity for Congressional legislation to execute the obligations of a treaty is an important limitation upon the treaty-making power.<sup>1</sup> This is a misconception which arises from a failure to distinguish between the international and constitutional aspects of treaties. Such an argument confuses the question of the validity of a treaty with that of its execution. It is too well established to admit of question that the powers of the treaty-making body may overlap with those of Congress, operating upon the same objects. The treaty-making power, if exercised with reference to a matter which is properly the subject of negotiation with a foreign country, can bind our government fully in an international sense, though the action of other departments of the government may still be necessary to execute the treaty. When by treaty we bind ourselves to take some action which, under the Constitution, can be taken only by Congress, it is no objection to say that, in such case, the action of Congress is merely perfunctory, so that it is deprived of its discretion to act in accordance with its own wishes when the occasion arises. This may practically be true, for, in an international sense, Congress may be placed under a moral or political obligation to act in a certain way at a future time, but from the constitutional point of view, Congress is still in possession of complete legal freedom to act in accordance with its own discretion. Congress cannot abrogate the international obligation incurred, but it can constitutionally annul the treaty. Speaking of this distinction, ex-President Taft declares that "the suggestion that, in order to carry out such an obligation (to declare war) on the part of the United States, it would be necessary to amend the Constitution, grows out of a confusion of ideas and a failure

<sup>1</sup> D. J. HILL, "PRESENT PROBLEMS IN FOREIGN POLICY," p. 164.

to analyze the differences between the creation of an obligation of the United States to do a thing and the due, orderly, and constitutional course to be taken by it in doing that which it has agreed to do.”<sup>1</sup>

Some of the provisions of the Covenant contemplate the creation of an international obligation not to take certain action or to take only limited action in reference to certain matters. Thus, by Article VIII, after the adoption by the several governments of the plans formulated by the Council for the reduction of armaments, they agree not to exceed such limits without the concurrence of the Council. By Article XII the contractuaries agree not to resort to war until three months after the award by the arbitrators or the report of the Council, and by Article XV they agree not to go to war with any party to the dispute which complies with the recommendations of the Council's report. These provisions undertake to place a limit, in an international sense, upon the full discretion of Congress granted to it in the Constitution to declare war, raise and support armies, and provide and maintain a navy. If, however, the treaty-making power can bind the United States internationally to take certain action requiring for its completion the consent and supplementary action of other branches of the government, it is not perceived that there is any real difference in principle in exercising the same power to bind our government internationally not to take certain action or to take only limited action in certain directions. We have hitherto entered into treaties by which a limitation is attempted to be placed upon the exercise by Congress of its power to declare war. Thus, under the so-termed Bryan peace treaties, the United States agreed with a number of powers not to go to war with the other contracting party pending investigation of the dispute by an international commission.<sup>2</sup> Furthermore, by the Rush-Bagot agreement between the United States and Great Britain in 1817, the two powers undertook mutually to limit the extent of their naval armaments on the Great Lakes.<sup>3</sup> Although this agreement was at first a mere exchange of notes, it subsequently became a full-fledged treaty through the advice and consent

<sup>1</sup> ENFORCED PEACE, p. 67.

<sup>2</sup> See, e. g., 38 U. S. Stat. at L. 1853.

<sup>3</sup> MALLOY, *op. cit.*, p. 629.

of the Senate to its ratification. It is true, however, that it did not contemplate such a general reduction or limitation of armaments as is provided by Article VIII of the Covenant, but it did place a limit internationally upon the power of Congress to provide for the construction of warships upon a designated portion of our coastline.

Under Article XX, the contractuaries undertake that they will not hereafter enter into any engagements inconsistent with the terms of the Covenant, and by Article XVIII, it is declared that no treaty entered into hereafter by the members of the League shall be binding unless registered with the secretariat. These provisions have been attacked as placing an unconstitutional limitation upon, and delegation of, the treaty-making power of the United States. But if, as above pointed out, the treaty-making body can enter into engagements which place limits, in an international sense, upon the powers of Congress, no reason is perceived why, in the same sense, it may not place limits upon itself. Article XVIII constitutes a conditional self-limitation upon the binding force of international engagements entered into by the treaty-making body, but places no constitutional limitation upon the treaty-making power not already existing.

With reference to the matter of mandatories provided for in Article XXII, two constitutional questions may be raised, first, as to the power of the United States to act as a mandatory for any backward country. This question is settled by the provision inserted in the revised draft of the Covenant leaving it to the voluntary action of each power as to whether it shall undertake to act as a mandatory or not. So that the constitutional question would arise, not upon the adoption of the treaty containing the Covenant, but upon a proposal subsequently made to this country to act as a mandatory in any particular case. The second question is as to whether the United States could constitutionally participate through membership in the Council in defining the degree of authority to be exercised by the mandatory power over the backward country. This, however, would seem to be a lesser stretch of the treaty-making power than the bringing of a foreign territory under the sovereignty of the United States, which, it was established in the insular cases, can be done through the exercise of

such power. Nor would it seem to be any greater stretch than was exerted in the treaty or general act of 1889 between the United States, Great Britain, and Germany, providing for the joint nomination by the three powers of a chief justice of Samoa and a president of the municipal council of Apia, defining their powers and making provision for the payment of their salaries.<sup>1</sup> The working of this agreement was unsatisfactory, but that fact does not affect the constitutionality of entering into it.

Finally, the Covenant has been attacked, not because of any particular provisions, but because, taking it by and large, it establishes a super-government over the contracting parties.<sup>2</sup> To call the League of Nations a super-government is a misuse of terms. An organization which has no army of its own and no power of securing funds by taxing individuals, but is dependent upon its constituent members to supply these essential requisites of a real government, can hardly with propriety be called a super-government. It is rather an agency of the constituent members for accomplishing certain common purposes. The organs of the League are not so much representative assemblies as they are congresses of ambassadors of sovereign states. There is therefore no real analogy between the creation of the League of Nations and the formation of the United States Government under the Constitution of 1787. That government derived its authority from the people of the United States and had within its own control all the powers of government necessary for its maintenance and self-preservation, while the League of Nations has no dealings except with states and has no powers except those granted to it by the contractuaries. Its effectiveness will depend not so much upon the exercise of physical force as upon the mutual respect of its members and their loyal and spontaneous support of the principles of the League.

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<sup>1</sup> MALLOY, *op. cit.*, p. 1576.

<sup>2</sup> D. J. HILL, *op. cit.*, p. 112.

## APPENDIX V

### PROTOCOL OF SIGNATURE AND STATUTE ESTABLISHING THE PERMANENT COURT OF INTERNATIONAL JUSTICE <sup>1</sup>

#### PROTOCOL OF SIGNATURE

THE members of the League of Nations, through the undersigned, duly authorized, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on the 13th December, 1920, at Geneva.

Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The said Protocol shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex of the Covenant of the League.

The Statute of the Court shall come into force as provided in the above-mentioned decision.

Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic.

December 16, 1920

#### OPTIONAL CLAUSE

The undersigned, being duly authorized thereto, further declare, on behalf of their Government that from this date,

<sup>1</sup> With amendments to March, 1936.

they accept as compulsory *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions:

#### STATUTE

Art. 1. A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

#### CHAPTER I

##### *Organization of the Court*

Art. 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Art. 3. The Court shall consist of fifteen members.

Art. 4. The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

The conditions under which a State which has accepted the Statute of the Court but is not a Member of the League

of Nations, may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the Assembly on the proposal of the Council.

Art. 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the Members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

Art. 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of law.

Art. 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

Art. 8. The Assembly and the Council shall proceed independently of one another to elect the members of the Court.

Art. 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

Art. 10. Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

Art. 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Art. 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Art. 13. The members of the Court shall be elected for nine years.

They may be reelected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

In the case of the resignation of a member of the Court, the resignation will be addressed to the President of the Court for transmission to the Secretary-General of the League of Nations.

This last notification makes the place vacant.

Art. 14. Vacancies which may occur shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General of the League of Nations shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Council at its next session.



Art. 15. A member of the Court elected to replace a member whose period of appointment has not expired, will hold the appointment for the remainder of his predecessor's term.

Art. 16. The members of the Court may not exercise any political or administrative function, nor engage in any other occupation of a professional nature.

Any doubt on this point is settled by the decision of the Court.

Art. 17. No member of the Court can act as agent, counsel or advocate in any case.

No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international court, or of a commission of inquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

Art. 18. A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

Art. 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Art. 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

Art. 21. The Court shall elect its President and Vice-President for three years; they may be reelected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

Art. 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

Art. 23. The Court shall remain permanently in session

except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

Members of the Court whose homes are situated at more than five days' normal journey from The Hague shall be entitled, apart from the judicial vacations, to six months' leave every three years, not including the time spent in travelling.

Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court.

The President may summon an extraordinary session of the Court whenever necessary.

Art. 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Art. 25. The full Court shall sit except when it is expressly provided otherwise.

Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

Provided always that a quorum of nine judges shall suffice to constitute the Court.

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Art. 29. With a view to the speedy despatch of business, the Court shall form annually a Chamber composed of five judges who, at the request of the contesting parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit.

Art. 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

Art. 31. Judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these parties may proceed to select a judge as provided in the preceding paragraph.

Art. 32. The members of the Court shall receive an annual salary.

The President shall receive a special annual allowance.

The Vice-President shall receive a special allowance for every day on which he acts as President.

The judges appointed under Article 31, other than members of the Court, shall receive an indemnity for each day on which they sit.

These salaries, allowances and indemnities shall be fixed by the Assembly of the League of Nations on the proposal of the Council. They may not be decreased during the term of office.

Art. 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

## CHAPTER II

### *Competence of the Court*

Art. 34. Only States or Members of the League of Nations can be parties in cases before the Court.

Art. 35. The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such State is bearing a share of the expenses of the Court.

Art. 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Art. 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

Art. 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified

publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex æquo et bono*, if the parties agree thereto.

### CHAPTER III

#### *Procedure*

Art. 39. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of any party, authorize a language other than French or English to be used.

Art. 40. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General, and also any States entitled to appear before the Court.

\* \* \* \* \*

### CHAPTER IV

#### *Advisory Opinions*

Art. 65. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of

Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

Art. 66. 1. The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary-General of the League, and to any States entitled to appear before the Court.

The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Should any Member or State referred to in the first paragraph have failed to receive the communication specified above, such Member or State may express a desire to submit a written statement, or to be heard; and the Court will decide.

2. Members, States, and organizations having presented written or oral statements or both shall be admitted to comment on the statements made by other Members, States, or organizations in the form, to the extent and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to Members, States, and organizations having submitted similar statements.

Art. 67. The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of Members of the League, of States and of international organizations immediately concerned.

Art. 68. In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

## APPENDIX VI

### THE RECOGNITION OF RUSSIA

The policy of non-recognition of Soviet Russia, maintained by Presidents Wilson, Harding, Coolidge and Hoover, was reversed by President Roosevelt. It is true that commerce between the two countries had not been altogether cut off, although it was felt that it was hampered by the lack of direct diplomatic relations. Moreover, the fact that the United States could not altogether ignore the existence of Russia as one of the important powers of the world was shown by the fact that on several occasions we had been in indirect relations with her. For example, the United States and Russia were co-signatories of the Kellogg Pact and in 1929 the United States had reminded Russia of her obligations under that instrument, the admonition to her being sent through the French Foreign Office. Again, the United States and Russia have both been represented at various international conferences, among the latest of which were the Disarmament Conference and the London Economic Conference of 1933. The delegates from the two countries to such conferences had the opportunity, which they no doubt used, of discussing matters of common concern. Such indirect relations with Russia, however, did not constitute recognition in the technical sense, because there was no intention of according it. Nor was there any such intention when, in 1933, President Roosevelt, in addressing the peoples of the world, sent a message directly to the Soviet Government.

### REASONS FOR NON-RECOGNITION

There were two main reasons which had impelled the preceding administrations to refuse to recognize Russia. The first was the failure of Russia to pay, or even to recognize her obligation to pay, the debts contracted by the

government of that country before the advent of the Soviet régime, as well as the American claims against the Soviet Government. In view of the fact, however, that most of our European debtors, whom we still continued to recognize, had defaulted, the force of this objection to recognition was somewhat weakened. The second main reason was that the Third International, a communist organization closely associated with the Soviet Government, had engaged in the spread of propaganda designed to undermine the governments of the so-called capitalist countries, including the United States. There was reason to believe, however, that such attempts were no longer actively carried on, as the Russians had enough fully to occupy themselves in working out their internal economic development.

#### EXTENSION OF RECOGNITION

Certain developments preceding actual recognition foreshadowed that event. Thus, during the summer of 1933, the United States for the first time extended credit to Russia for the purchase of cotton from us. This was in the form of a loan of \$4,000,000 to the Amtorg Trading Corporation by the Reconstruction Finance Corporation. Furthermore, the disturbed condition of affairs in the Far East due to the aggressive tactics of Japan in Manchuria pointed to the desirability of a *rapprochement* between the United States and Russia. Finally, the political and social philosophy behind the "New Deal" inaugurated by the Roosevelt Administration, although differing in important respects from the Five Year Plan followed in Russia, had enough points of similarity with it to indicate that the two governments were not so far apart in fundamental aims as they had previously been.

Accordingly, in a message addressed in October, 1933, to President Kalinin of the U. S. S. R., President Roosevelt invited the opening of negotiations preliminary to the renewal of diplomatic relations between the two countries. The invitation was accepted in the same spirit in which it was extended, and Litvinov, the Russian Commissar of foreign affairs, came to Washington to conduct the negotiations on behalf of his government. As a result of the Roosevelt-Litvinov conversations, an agreement was



reached in November through an exchange of notes embodying the following points: First, a reciprocal pledge was taken to refrain from all propaganda directed at undermining the respective governments. Second, Americans residing temporarily or permanently in Russia were to be accorded freedom of religion and worship. Third, a convention was to be entered into providing for the legal protection in Russia of the rights of American nationals not less favorable than those enjoyed in Russia by nationals of the nation most favored in this respect. Fourth, Russia waived her claim arising out of the American military occupation of Siberia in 1918-1920. Further negotiations on claims were to take place later.

As a result of these conversations, formal recognition was extended by the United States and normal diplomatic relations between the two countries were reestablished after a lapse of sixteen years. In his Savannah address of November 18, President Roosevelt declared that "the most impelling motive" underlying the exchange of notes was "the desire of both countries for peace and for the strengthening of the peaceful purposes of the civilized world."

This event has an interesting bearing upon the development of the recognition policy of the United States and is noteworthy in that the entire process of recognition was carried out under the sole responsibility of the President and without the participation of Congress. The Senate, however, was called upon to confirm the President's nomination of an ambassador to Russia and Congress to appropriate the funds for his salary.



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